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In The

Supreme Court of the United States

October Term, 1995

CITY OF MEMPHIS; DR. W.W. HERENTON, Mayor; MELVIN BURGESS, Director of Police Services,

Petitioners,

vs.

EAST BROOKS BOOKS, INC., d/b/a Getwell Bookmart and Airport Adult Theater, STEVE COOPER, SOUTHERN ENTERTAINMENT MANAGEMENT COMPANY, INC., d/b/a Club Tiffany,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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119 pp

QUESTIONS PRESENTED

I. Whether "prompt judicial review" of administrative licensing decisions for First Amendment activities, and particularly for licensing decisions pursuant to Memphis' adult business licensing ordinance, is satisfied by providing access to a state court appeal within a specified time (as the First, Fifth, and Seventh Circuit ruled), or must the actual adjudication be completed within a specified time (as ruled by the Fourth and Sixth Circuits).

II. Whether disclosure of certain information by all shareholders in corporate adult businesses violates the First Amendment.

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The City of Memphis, the Mayor, and Police Director respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 48 F.3d 220 (6th Cir. 1995). The opinion of the District Court for the Western District of Tennessee (App. C, *infra,* 18a) is unreported.

STATEMENT OF JURISDICTION

The District Court entered its final judgment on July 15, 1993. The United States Circuit Court of Appeals for the Sixth Circuit entered its judgment on March 7, 1995. Your Petitioners' Petition for Rehearing with Suggestion of Rehearing En Banc was denied May 5, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

This provision applies to the states through the Fourteenth Amendment.

The Memphis Adult Business Ordinance (Ordinances 4013 and 4198, City Code §§ 20-121, *et seq.*) are reproduced in the Appendix Dand E, 52a-92a.

STATEMENT OF THE CASE

These cases involve challenges to the facial validity or constitutionality of Memphis' Adult Business Ordinance by adult bookstores and a topless club. The Ordinance provides for licensing of adult businesses, as well as certain zoning-type location requirements. The ordinance is nearly identical to that litigated in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990), and amendments made in accordance with that decision.

District Judge Julia Smith Gibbons, Western District of Tennessee, upheld all provisions save one of the location requirements, not at issue in this Petition. The United States Court of Appeals for the Sixth Circuit affirmed that location ruling; reversed the rulings as to the method of appealing an adverse administrative decision, disclosure of certain shareholder information regarding corporate ownership of adult businesses, and the prohibition of permits for those demonstrating an inability peaceably to operate a business; further, the court vacated the ruling upholding certain permit qualification provisions due to plaintiffs' lack of standing (as Defendants had argued before the District Court).

This Petition addresses the conflict between the First, Fifth, and Seventh Circuits as opposed to the Sixth and Fourth Circuits, regarding prompt judicial review of administrative licensing decisions. We also address the ruling on shareholder disclosure and its conflict with a prior ruling of this Court.

REASONS FOR GRANTING THE WRIT

I.

THE RULING CREATES A CONFLICT AMONG THE CIRCUITS AS TO "PROMPT JUDICIAL REVIEW" OF ADMINISTRATIVE LICENSING DECISIONS.

This Court ruled in 1990 that in a licensing ordinance for businesses engaged in First Amendment activity,

> [T]he licensor must make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained, and there must be the possibility of prompt judicial review in the event that the license is erroneously denied.

FW/PBS, Inc. v. City of Dallas, 110 S. Ct. 596, 606, 607 ("availability" of prompt judicial review).[1]

Confusion engendered by whether "prompt judicial review" is satisfied by providing *access* from the local administrative decision-maker to the independent state judiciary within a specified brief period, or whether actual *completion* of judicial review within a specified time is required, has resulted in no less than eight circuit decisions in the last two years by the First, Fourth (twice), Fifth (twice), Sixth, Seventh and Eleventh Circuits. The Sixth Circuit decision in this case, that actual

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1. The Memphis Ordinance requires that issuance of a permit "shall" occur within 30-days from the application unless the applicant does not qualify. Ordinance § 20-122(b)(1) (66a). An applicant may obtain a stay during judicial review. § 20-124(7) (75a). These matters are not at issue in this Petition.

completion of judicial review within a specified brief period is required, created a division among the circuits. (Since this ruling, the Fourth Circuit has joined the Sixth Circuit in the split. Your Petitioners are advised that Defendants in the Fourth Circuit cases will also petition the Court for certiorari on this issue.)

The Memphis Adult Business Ordinance, reproduced in the Appendix, provides *access* to state courts at any time within thirty days following an administrative denial, suspension, or revocation of an Adult Business Permit.[2] This access becomes available — with the administrative ruling stayed pending a judicial determination — on the very day of the administrative ruling. The Sixth Circuit concedes that such review "is expressly authorized by statute in Tennessee," but ruled that under such review "there is no guarantee of prompt judicial review," because the appeal is potentially subject to "indefinite delays" after it is filed in the state court, *i.e.*, that no time limit is specified within which the actual adjudication must occur. *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 225 (6th Cir. 1995) (App. B., 9a-10a).

The Fourth Circuit has very recently adopted the Sixth Circuit's position in two *en banc* companion cases. *11126 Baltimore Blvd., Inc. v. Prince George's County*, No. 93-2151, ___ F.3d ___, 1995 U.S. App. LEXIS 16400, 1995 WL 392074 (4th Cir. July 5, 1995); *Chesapeake B & M, Inc. v. Harford County, Maryland*, No. 94-1270, ___ F.3d ___, 1995 U.S. App. LEXIS 16401, 1995 WL 392078 (4th Cir. July 5, 1995). Noting

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2. The method of judicial review specified by the ordinance is the Tennessee common law writ of certiorari, *i.e.*, review of the record by the state circuit or chancery court for arbitrariness, illegality, or capriciousness. Tennessee Code Annotated §§ 27-8-101, *et seq.* The Ordinance also specifically provides for the writ of supersedeas, Tenn. Code Anno. § 27-8-112, which "shall" issue to stay any suspension or revocation, or denial of permit for an existing business, until the matter can be ruled upon by a court. Ordinance § 20-124(7) (75a).

that "[t]he questions presented are difficult, and there is little authority to guide our decision," *11126 Baltimore Blvd.* at original p. 37, a divided court ruled that prompt *access* to the courts, with procedure according to the time limits set out in the Maryland state law on administrative appeals, was insufficient; rather, "prompt judicial review means a sufficiently prompt *decision* on the merits." *Chesapeake B & M* at original p. 19 (emphasis added). (A decision in Maryland could potentially take 150 days, which the court ruled inadequate. The Sixth Circuit rejected Tennessee state law because it could potentially take as long as 90 - 150 days from application to adjudication.) The Fourth Circuit reversed the following ruling of the District Court, which relied upon the Fifth Circuit decisions, *infra*. We reproduce it here as it best states the issue:

> As the Supreme Court has made evident, a licensing ordinance need only provide for the *availability* of prompt judicial review. In *FW/PBS*, the Supreme Court twice indicated that such ordinances need only assure an avenue for judicial review. 493 U.S. at 227-228, 110 S.Ct. at 606 ("there must be the *possibility* of prompt judicial review in the event that the license is erroneously denied" and "expeditious judicial review of that decision must be made *available*") (emphasis added [by the District Court]). While the court thus recognized the importance of judicial review, it never held that the judiciary must restructure itself to resolve licensing disputes within a set period. Instead, the court simply struck down the underlying ordinance because it contained no provision allowing for an appeal to a court.

> In the instant case, the Court finds no support for [the plaintiff's] claims of unconstitutionality. In light of *FW/PBS*, the [County] ordinance is constitutional because it expressly provides for judicial review by the County's circuit court. The County has no further obligation to set time limits on judicial review.

Chesapeake B & M, Inc. v. Harford County, Md., 831 F. Supp. 1241, 1250 (D. Md. 1993), *see also*, fn. 3 (since plaintiffs attack the review method mandated by state law, the proper defendant should have been the state). Additionally, on appeal the Fourth Circuit dissent argued persuasively that First Amendment law is not implicated in these types of ordinances because the objective factors for issuing a permit do not allow unbridled discretion on the part of the licensor. *Chesapeake B & M*, original pp. 45-46.

The Fifth Circuit came to what we respectfully submit is the correct conclusion twice last summer, on similar ordinances.

> In *Freedman v. Maryland*, 380 U.S. 51, 59, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), Justice Brennan stated that a challenged ordinance must guarantee a specified brief period "in advance of a final judicial determination on the merits." Justice O'Connor in *FW/PBS* [the Dallas case] variously recast this standard as a specified brief period "prior to judicial review" and as a specified brief period "prior to issuance of a license." We have interpreted this language to require only *access to* the courts within a specified brief period.

Grand Brittain, Inc. v. City of Amarillo, Texas, 27 F.3d 1068, 1070 (5th Cir. 1994), *reh. denied*, (emphasis added), referring to their decision a month earlier in *TK's Video, Inc. v. Denton County, Texas*, 24 F.3d 705 (5th Cir. 1994), *reh. denied*. That Court noted that an aggrieved applicant or permit holder has thirty days to seek judicial review (as does Memphis) and continued,

> [t]his does not answer the further question of how much of the total licensing process must be completed within the specified brief period, specifically whether the specified brief time period includes completion of judicial review. Despite contrary suggestions in Justice Brennan's opinion in *FW/PBS, Inc.* and some uncertainty in the language of Justice O'Connor's opinion in the same case, we read the Supreme Court to insist that the state must offer a fair opportunity to complete the *administrative* process and *access* the courts within a brief period. A "brief period" within which all judicial avenues are exhausted would be an oxymoron.

TK's Video, Inc., 24 F.3d at 709, *reh. denied* (emphasis added).

The Seventh Circuit ruled *en banc* that an aggrieved party's *access* to the courts (via availability of the same method of review provided in this ordinance) constituted sufficient review. They noted that, in fact, state law provided the *only* review possible, since a city is without authority to direct the procedure or limit the time of a state court.

> . . . [T]he Court has not been presented directly with the argument that *certiorari* was

> in itself sufficient review especially where a state makes the common law writ the current common practice, and in fact forbids any other kind of review.[3] We conclude that such review is sufficient [where the ordinance did not specify any form of review]. Illinois has shown that a judicial forum *is available* to review administrative agency decisions. The state maintains uniform judicial review procedures by forbidding home rule units such as Chicago from commenting on the matter. As such, the state can expect such uniform procedures to expedite cases and better serve the interests of [the plaintiff] in a case such as this.

Graff v. City of Chicago, 9 F.3d 1309, 1325 (7th Cir. 1993) (emphasis added). Please note that *Graff* did not involve adult businesses, but permits for sidewalk newsstands which, of course, enjoy far greater First Amendment protection. *See Young*

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3. Neither did the Sixth Circuit reject the Tennessee writ of certiorari as inadequate *per se*, but only as to the possible delays after the writ is obtained. The Sixth Circuit has, in fact, recognized the writ as the proper method of review in another constitutionally-sensitive area. *See Louisville & N.R.R. v. Public Serv. Comm'n*, 493 F. Supp. 162 (M.D. Tenn. 1978), *aff'd*, 631 F.2d 426 (6th Cir. 1980), *cert. denied*, 450 U.S. 959, 101 S. Ct. 1418, 67 L. Ed. 2d 384 (1981) (common-law writ of certiorari is proper method of review for alleged violation of a taxpayer's right to equal protection). Respondents' likely citation to the unreported case of *Brothers Three Enterprises, Inc. v. Knox County*, No. 3-89-35 (E.D. Tenn., February 4, 1991), is misplaced. The Court ruled that the writ of certiorari (*i.e.*, review of legality of proceedings and procedure below) was insufficient review because that local-option statute allowed for unlawful administrative procedure. That statute also constituted prior restraint, thus full prior restraint law applied. *Cf. FW/PBS*, 110 S. Ct. at 606 (procedure of *Freedman v. Maryland*, 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 [1965] only partially applies to the Dallas/Memphis ordinance).

v. American Mini Theaters, Inc., 427 U.S. 50, 96 S. Ct. 2440, 2452, 49 L. Ed. 2d 310 (1976). Note also, as to the last sentence in the quote, that the Tennessee Supreme Court long ago described the virtually-identical Tennessee common law writ of certiorari as provided in the Ordinance "one of the most efficient remedies provided." *Tennessee Cent. R.R. Co. v. Campbell*, 75 S.W. 1012 (Tenn. 1902); *see* Tenn. Code Anno. § 27-8-101, *et seq.*

The First Circuit agrees with the Fifth and Seventh Circuits, that *FW/PBS* is satisfied by providing access to state court, with the case then following general state procedure.

> [T]he regulations must limit the time for issuing authorization and must permit prompt judicial review.
>
> The Guidelines satisfactorily incorporate these safeguards. The Authority responds to each request at the time it is made. . . . The applicant may appeal a denial of authorization, and the filing of an appeal entitles the claimant to a hearing in accordance with Mass. Regs. Code tit. 801, § 1.02.

Jews for Jesus, Inc. v. Massachusetts Bay Transp. Authority, 984 F.2d 1319, 1327 (1st Cir. 1993), citing *FW/PBS*.

In this case, the Sixth Circuit did not distinguish these cases or cite to them on this all-important issue, for without a valid review method, permit portions of the ordinance necessarily fail. The court instead relied upon an Eleventh Circuit case "holding that [a] similar ordinance failed to provide adequate safeguards [regarding the] *administrative* hearing. . . ." *East Brooks*, 48 F.3d at 225 (App. B, 10a), referring to *Redner v. Dean*, 29 F.3d

1495, 1497-98 (11th Cir. 1994) (emphasis added). But the issue here is the *judicial* review and access to the courts *following* the administrative ruling. Our District Court *upheld* Memphis' *administrative* review, and the Sixth Circuit panel left that ruling undisturbed. The First, Fifth, and Seventh Circuit cases noted above, holding that the requirement for prompt *judicial* review is satisfied by providing prompt *access* to the courts, are *directly on point.* Further, Eleventh Circuit *dicta* agrees with those cases. In *Redner,* the County argued that the provision for an intermediate administrative review "as soon as the Board's calender will allow" was unobjectionable, because an aggrieved party could as an alternative make a direct appeal to state court by means of a common law writ of certiorari. The Court rejected this argument, stating that to "hold that an aggrieved applicant who follows the appellate procedure provided by the Ordinance [*i.e.*, intermediate administrative review with no time limits] risks foreclosing his *opportunity for prompt judicial review* [common-law writ of certiorari] is a leap in logic we are unprepared to take." 29 F.3d at 1502 (emphasis added).

Clearly the Circuits are divided and confused as to prompt judicial review. The Petition should be granted to resolve the matter.

II.

THE QUESTIONS PRESENTED ARE IMPORTANT.

A. The Ruling Improperly Accords the Speech of Adult Businesses an Undue Level of Protection Not Accorded Political, Religious, and Other Types of Speech Considered the "Core" of the First Amendment.

The type of expression involved in the cases at bar "is of a wholly different, and lesser, magnitude than the interest in

untrammeled political debate." *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 96 S. Ct. 2440, 2452, 49 L. Ed. 2d 310 (1976), *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S. Ct. 925, 929-930, 89 L. Ed. 2d 29 (1986), *FW/PBS v. City of Dallas*, 837 F.2d 1298, 1302 (5th Cir. 1988). The expressive conduct at the topless clubs (*Steve Cooper, et al.*) merits even less protection, "within the outer perimeters of the First Amendment, though we view it as only marginally so." *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2460 (1991). *See also, California v. LaRue*, 409 U.S. 109, 118, 93 S. Ct. 390, 397, 34 L. Ed. 2d 390 (1972) ("only the barest minimum of protected expression").

Just as in the Seventh Circuit *Graff* decision, it is the case in Tennessee and apparently in other states' administrative review, that a city or county has no authority to prescribe a state court's schedule and procedure. *See Graff v. City of Chicago*, 9 F.3d 1309, 1325 (7th Cir. 1993); *Chesapeake B & M, Inc.*, 831 F. Supp. at 1250 fn. 3 (plaintiff should have named the state as a party if it attacks state method of review), *rev'd on other grounds*, ___ F.3d ___, 1995 U.S. App. LEXIS 16401, 1995 WL 392078 (4th Cir. July 5, 1995); *see generally*, Sixth Circuit states' *Civil Service Merit Board of the City of Knoxville v. Burson*, 816 S.W. 2d 725 (Tenn. 1991); *Stansbury v. Maupin*, 599 S.W. 2d 170 (Ky. 1980); *State ex rel. McElroy v. City of Akron*, 181 N.E. 2d 26, 173 Ohio St. 189, 19 O.O. 2d 3, *app. dismissed*, 371 U.S. 35, 83 S. Ct. 145, 9 L. Ed. 2d 113 (1962). And apparently most other states provide the same or nearly the same method of review of an administrative ruling. *Graff, supra; Redner v. Dean*, 29 F.3d 1495 (11th Cir. 1994); Sixth Circuit States' Tenn. Code Anno. § 27-9-101, *et seq.*; Mich. C.L.A. §§ 24.201, *et seq., see especially*, 24.304; Ohio Rev. Code Chapter 2506.

Because the City Council of Memphis (or better yet, that of Pigeon Forge, or of Bucksnort) has no authority whatever to dictate procedure to a state court, and because the panel ruled the

state procedure insufficient, the effect is that Memphis and other cities in the Sixth and now Fourth Circuits — and these Circuits alone are left without a valid method for appeal. Cities in these Circuits thus have no ability to regulate adult businesses, with their documented secondary ill effects, by permit. These cities and other local governments may still require permits for parades; for hanging banners over streets; for operating theatres; for building churches; for engaging in charitable solicitation. Denials of permits for those First Amendment activities will continue to be heard on appeal by writ of certiorari to state court, according to state court rules of procedure, at a time designated by the state court. So too will revocations of law licenses, medical licenses, architectural licenses, civil service terminations where a family bread-winner waits without income for "three to five months," *East Brooks*, 48 F.3d at 225 (App. B, 10a), and any number of other constitutionally-sensitive appeals. But the panel decision has it that such review is insufficient for holders of adult business permits. The effect of the panel's decision is to *elevate* what we may call pornographic speech to a position unrivaled by even political and religious speech. Such a gross distortion of First Amendment jurisprudence should be corrected by the Court.

Alternatively, if such review is also constitutionally insufficient for those regulations, virtually all municipal regulation of expressive activities will fail. Years of litigation will be necessary in order to test the implications of the panel's decision. The Petition should be granted to check a flood of litigation and wholesale restructuring of court review of First Amendment regulations.

In rejecting the method of review mandated by the State as insufficient in this case because it could potentially result in a three-to-five-months wait from application to adjudication, the panel referred to *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) and *United States v. Thirty-Seven Photographs*,

402 U.S. 363, (1971). First, those cases involve obscenity and prior restraint, which are not at issue here. "Under the Dallas [Memphis] ordinance, the city does not exercise discretion by passing judgment on the content of any protected speech. Rather, the city reviews the general qualifications of each license applicant, a ministerial action that is not presumptively invalid." *FW/PBS v. City of Dallas*, 493 U.S. 215, 229, 110 S. Ct. 596, 607, 107 L. Ed. 2d 603 (1990). "[T]he licensing scheme at issue in this case does not involve the 'grave dangers of a censorship system.' " *Id.* at 606, quoting *Freedman v. Maryland*, 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965). Second, those obscenity cases specify that reasonableness in this area "will vary in different contexts." *Thirty-Seven Photographs*, 402 U.S. at 374. *See also, Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 902, 47 L. Ed. 2d 18 (1976).

During the court-review period to determine obscenity in *Southeastern Promotions* and *Thirty-Seven Photographs*, the films or photographs there are not being shown, *i.e.*, they are censored at least for that duration. Thus the necessity for a very short review period. But during the time between the Memphis suspension or revocation and the judicial review, the business may *remain in operation, continuing* to show films and provide other such entertainment. Ordinance 3958, § 20-124(7) (App. D, 75a).

Remember that the threat is the impermissible risk of *suppression* of ideas. *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 798, n. 15, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984); *Freedman v. Maryland*, 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965). Because a Memphis permit holder may *continue* to do business following an administrative suspension or revocation until an adverse *judicial* decision, there is no suppression of speech.

In fact, a delay of even three to five months undeniably inures to such permit holder's benefit. If the action of the city was indeed warranted, he has gained an additional three to five months business activity. Defendants respectfully submit that the argument that a permit holder's rights are offended by delaying enforcement of a valid suspension or revocation is, to say the least, disingenuous. As the reversed Maryland District Court noted, if the plaintiff "is truly concerned about expeditious review by the [state] court," it has available Maryland's "motion to shorten time." *Chesapeake B & M, Inc. v. Harford County, Md.*, 831 F. Supp. 1241, 1250-1251 (D. Md. 1993). Although Tennessee has no specific rule providing such a motion, these plaintiffs could make such a motion, or they could move for a 30-day summary judgment[4] (since trial is on the record anyway), or they could set the matter for the trial docket as soon as the issue is joined. In sum, "[b]ecause the license is the key to the applicant's obtaining and maintaining a business, there is every incentive for the applicant to pursue a license denial through court" and to do so in an expeditious manner. *FW/PBS*, 493 U.S. at 230-231, 110 S. Ct. at 607.[5]

B. The Ruling on Shareholder Disclosure Is Inconsistent With the Case Law of This Court.

The Memphis Ordinance provides that shareholders in corporate owners of adult businesses must apply for and receive a permit to do business. In so doing, they must disclose certain information regarding their qualifications. Ordinance 3958, § 20-122(a)(5) (App. D, 64a). This was approved by the District Court.

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4. Tennessee Rule of Civil Procedure 56.

5. Plaintiffs have previously suggested that the ordinance could require the *city* to go to court to effect a denial, suspension, or revocation. Such a requirement was explicitly rejected by this Court in *FW/PBS*, 493 U.S. at 230, 110 S. Ct. at 606-607.

The Sixth Circuit panel reversed the District Court. They did agree,

> that the City has a legitimate interest in identifying those who are legally accountable for the operation of a sexually oriented business, and perhaps those who have a controlling or significant share in such a business. The requirement that every person with any ownership interest, regardless of how small, sign the application, however, is impermissibly broad.

East Brooks, 48 F.3d at 226 (App. B, 13a).

The court did not explain how the requirement was impermissibly broad, but cited opinions by other courts that such provisions might "chill" First Amendment rights. *Id.* Your Petitioners respectfully submit that there can be no logical distinction between disclosure of information by a large shareholder versus a small shareholder. The panel agrees that there is a legitimate interest in identifying the accountable person(s) behind the business. The Ordinance preamble documents the fact that in other Memphis permit systems, persons unqualified for a permit have used "front men" and false corporations to do business. Indeed, the plaintiffs in a companion case to these were dismissed because they named inactive or dummy corporations as plaintiffs (App. C, 20a, n. 1). One plaintiff, Herbert Rook, admitted in deposition that he had virtually nothing to do with "his" business, nor did he receive income from it, once he had obtained its beer permit. (The real owner has since been convicted on multiple RICO violations involving that and other adult businesses.) Clearly, accountability is destroyed if a person who knows he will not qualify for a permit, but who actually runs the business, owns

some small enough portion of the shares on paper to escape disclosure.

Further, the "speech" at an adult business establishment is made by a performer, *Barnes v. Glen Theater, Inc.*, 111 S. Ct. 2456 (1991), by the publisher of material sold, or at most by the seller corporation. *See City of Lakewood v. Plain Dealer,* 486 U.S. 750, 108 S. Ct. 2138, 2146, 100 L. Ed. 2d 771 (1988). But Petitioners submit that no First Amendment protection attaches to silent minority ownership of a stock certificate in a corporation that owns (but may or may not actually operate) an adult business, on the premises of which marginally-protected speech occurs.

A leading authority in this entire field agrees with us, and makes the further point that such protection is given adult business owners to the exclusion of others having supposedly greater First Amendment protection.

> The Supreme Court has never ruled on the constitutionality of licensing schemes that impose personal qualification requirements on owners and employees of adult businesses.
>
> It is not easy to see why the courts have a problem with these provisions. As a condition for granting mailing privileges, a federal statute requires newspapers and other periodicals annually to furnish to the Postal Service, and to publish, "the identity of the corporation and stockholders thereof, if the publication is owned by a corporation, [and] the identity of known bondholders, mortgagees, and other security holders" of the publication. [39 U.S.C. § 3685.] The constitutionality of the statute has been

> upheld by the Supreme Court. [*Lewis Publication Co. v. Morgan*, 229 U.S. 288 (1913).] If corporations that own periodicals that engage in speech that is fully protected under the First Amendment may be required to make such disclosures, why must corporations that engage in speech that is only marginally protected be exempted? Moreover, in this age of banking and security scandals involving concealed interests, and of concern about organized crime surreptitiously taking over legitimate businesses, it is hard to credit an argument that government has no legitimate interest in knowing the owners of businesses that the Supreme Court has recognized do generate crime problems.

Professor Jules B. Gerard, Washington University (St. Louis), *Local Regulation of Adult Businesses*, 1995 Edition (Deerfield, Ill: Clark, Boardman, Callaghan), § 5.04, p. 211; § 5.05, p. 220.

CONCLUSION

The Sixth Circuit ruling created a conflict among the Circuits. The matter involves questions of exceptional importance, particularly in view of the implications for regulating other types of First Amendment-related activities. For these reasons and those stated above, the Petition should be granted.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED MAY 5, 1995

Nos. 93-6102/3/4

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EAST BROOKS BOOKS, INC. (93-6102); STEVEN C. COOPER; SOUTHERN ENTERTAINMENT MANAGEMENT COMPANY, INC., (93-6103),

Plaintiffs-Appellants/Cross-Appellees,

v.

CITY OF MEMPHIS,

Defendant-Appellee/Cross-Appellant (93-6104),

W.W. HERENTON; MELVIN BURGESS,

Defendants-Appellees.

ORDER

BEFORE: KENNEDY and SUHRHEINRICH, Circuit Judges; and HOOD,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original

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* Hon. Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation

panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk se

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED MARCH 7, 1995

Nos. 93-6102/6103/6104

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

EAST BROOKS BOOKS, INC. (93-6102); STEVEN C. COOPER; and SOUTHERN ENTERTAINMENT MANAGEMENT COMPANY, INC. (93-6103),
Plaintiffs-Appellants/ Cross-Appellees,

v.

CITY OF MEMPHIS,
Defendant-Appellee/ Cross-Appellant (93-6104),

W.W. HERENTON and MELVIN BURGESS,
Defendants - Appellees.

} ON APPEAL from the United States District Court for the Western District of Tennessee

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Decided and Filed March 7, 1995

Appendix B

Before: KENNEDY and SUHRHEINRICH, Circuit Judges; and HOOD, District Judge.*

KENNEDY, Circuit Judge. Plaintiffs, East Brooks Books, Inc., Steve C. Cooper, and Southern Entertainment Management Company, Inc., brought this action against the City of Memphis, Mayor W.W. Herenton and Police Director Melvin Burgess challenging the constitutionality of a licensing and zoning ordinance for sexually oriented businesses.[1] The District Court granted partial summary judgment to defendants on the licensing provisions and granted partial summary judgment to plaintiffs on the zoning provisions. Both parties appeal. Plaintiffs argue that the licensing scheme constitutes an impermissible prior restraint on protected speech. On cross-appeal, defendants argue that the District Court erroneously held that the amortization provision of the zoning regulations violated Tennessee law. For the following reasons, we affirm in part, reverse in part, and vacate in part.

I. *The Licensing Scheme*

On January 15, 1991, the Memphis City Council passed Ordinance 4013 ("the ordinance") which imposed a licensing and zoning scheme on all sexually oriented businesses within the City of Memphis ("the city").[2] The

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*The Honorable Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation.

[1]Plaintiff East Brooks Books, Inc. is a corporation that owns and operates two adult bookstores in the city. Plaintiff Southern Entertainment Management Company, Inc. is a corporation owned by Steve C. Cooper that operates an adult night club in Memphis featuring exotic dancing.

[2]The ordinance defines a sexually oriented business as "an adult arcade, adult bookstore or adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, escort agency, nude model

ordinance was enacted "to regulate sexually oriented business to promote the health, safety, morals, and general welfare of the citizens of the city and to establish reasonable and uniform regulations to prevent the continued concentrations of sexually oriented businesses within the city." *See* § 20-121(a). The Preamble to the ordinance states that the Memphis City Council concluded that there were serious secondary effects, such as crime and neighborhood deterioration, associated with the proliferation of sexually oriented businesses within the city. The City Council reached these conclusions after reviewing reports of the unusually large number of criminal arrests around sexually oriented businesses, reports prepared by the Memphis Vice Squad, and studies of the impact of sexually oriented businesses on other cities.

The ordinance imposes the following requirements on operators of sexually oriented businesses.[2] Anyone wishing to operate a sexually oriented business must apply for an operator's permit by filling out a form provided by the city's Director of Police Services. *See* § 20-122(a)(3). The Director of Police Services must issue a permit within 30 days unless the applicant possesses an enumerated "disabling factor," such as being overdue in payment of taxes or fines related to the business, failure to provide necessary information or providing false information on the application, or conviction of certain crimes within a specified time period. *See* § 20-122(b)(1) and (b)(3). Additionally, an applicant may not be issued a permit if he or she "has demonstrated an inability to operate or manage

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studio, or sexual encounter center or [for certain purposes] adult telecommunications business." *See* § 20-121(b)(22).

[2] In addition to the provisions discussed here, the ordinance also contains additional regulations for escort agencies, nude modeling studios, adult theaters, adult motion picture theaters, and adult hotels. *See* § 20-128 - § 20-131. These regulations are not at issue in this case.

a sexually oriented business premises in a peaceful and law-abiding manner, thus necessitating action by law enforcement officers." *Id.*

Sexually oriented businesses also must obtain permits for any employees and independent contractors whom they hire. *See* § 20-122(a)(8). Employees and independent contractors are subject to the same disabling factors for prior criminal convictions as operators. *Id.* All sexually oriented businesses are subject to a $5000 operating fee; employees and independent contractors are subject to a $15 fee. *See* § 20-122(c).

The ordinance limits the issuance of operating permits to natural persons. *See* § 20-122(a)(7). If a sexually oriented business is operated by an entity rather than an individual, each person who owns any interest in the entity must sign the application form and meet the qualification requirements discussed above. *See* § 20-122(a)(5). Sexually oriented businesses are subject to inspection by a variety of city departments, including the police and health departments, at any time the premises are occupied or open for business. *See* § 20-122(d).

The ordinance also contains provisions for the revocation and suspension of permits. The Director of Police Services is required to revoke or suspend an operator's permit if certain enumerated offenses are committed either by the operator or on the premises. *See* § 20-123. A permit will generally be revoked for five years, but in certain enumerated circumstances an operator may be able to apply for a new permit in ninety days. *See* § 123(b)(5). Suspensions may be for thirty days or less. *See* § 123(a).

The ordinance provides for appeals from the denial, revocation, or suspension of a permit. *See* § 20-124. After an adverse decision, an applicant has ten days to file an appeal with the Director of Police Services, who must hold a hearing within sixty days. *See* § 20-124(2) and (3). The Director of Police Services must make a decision in writing

within five days of the hearing. *See* § 20-124(5). If an operator appeals the suspension or revocation of a permit, the suspension or revocation will not occur within sixty days of the notice of appeal or prior to the date of the hearing, whichever is less, unless a health officer determines that there is a health hazard. *See* § 20-124(4). An applicant or permittee whose permit is denied, suspended, or revoked may appeal the Director's decision by common law writ of certiorari to a court of competent jurisdiction within thirty days. *See* § 20-124(6). No permit may be extended during a court appeal unless the court orders a writ of supersedeas. *See* § 20-124(7).

The District Court held that plaintiffs lacked standing to challenge the use of prior convictions to deny a permit and the disabling provisions for permit suspension and revocation. The District Court upheld the constitutionality of all of the other licensing provisions, except the $5,000 permit fee. Subsequently, the city reduced the licensing fee from $5000 to $500. Plaintiffs do not challenge the reduced fee. Additionally, the ordinance was modified to allow any adult oriented business operating at the time the ordinance becomes effective to continue to operate pending its permit application, provided the application is submitted within thirty days of the ordinance's effective date.

A. ***The Adequacy of Procedural Safeguards***

Plaintiffs make a facial challenge to the licensing scheme. "[O]ur cases have long held that when a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 755-56 (1988). Failure to place time limitations on a decision maker is a form of unbridled discretion. *See Freedman v. Maryland*, 380 U.S. 51, 56-57 (1965). Thus, in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 223-224 (1990) (plurality op.), the Supreme Court

held that when a licensing scheme creates a risk of delay, a facial challenge is appropriate because "every application of the ordinance create[s] an impermissible risk of suppression of ideas.'" *(quoting City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 798, n. 15 (1984)).

In *Freedman*, the Supreme Court struck down a Maryland motion picture censorship statute, holding that the statute failed to provide sufficient procedural safeguards to protect First Amendment rights. *See* 380 U.S. at 51. The Court determined that the following three procedural safeguards were required. First, any restraint imposed in advance of a final judicial determination must be for only a brief period of time and must be limited to preserving the status quo. *Id.* at 59. Second, expeditious judicial review must be available. *Id.* Third, the censor must bear both the burden of seeking judicial review and the burden of proof. *Id.* at 59-60.

In *City of Dallas*, the Supreme Court held that a licensing scheme did not present the grave dangers of a censorship scheme; therefore, the full procedural protections outlined in *Freedman* were unnecessary.[4] 493 U.S. at 228. The Court noted that the licensing scheme for sexually oriented businesses in question did not require the city to evaluate the content of protected speech. *Id.* at 229. Instead, the ordinance required the city to review the qualifications of the license applicants. *Id.* The Court reasoned, therefore, that the requirement in *Freedman* that the censor go to court to effect the denial of the license and bear the burden of proof was unnecessary. *Id.* at 230.

The core policy underlying *Freedman* is that the license for a First Amendment-protected business must be issued within a reasonable period of time, because undue delay

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[4] Although the Court's opinion was fragmented, six justices agreed that at least the first two requirements in *Freedman* were applicable.

> results in the unconstitutional suppression of protected speech. Thus, the first two safeguards are essential: the licensor must make the decision whether to issue the license within a specified and reasonable time period during which the status quo is maintained, and there must be the possibility of prompt judicial review in the event that the license is erroneously denied.

Id. at 228. Applying this standard, the Court held that the Dallas ordinance was invalid. *Id.* at 229. Although the ordinance required the Chief of Police to approve a license application within thirty days, the ordinance also required a series of inspections before the license could be issued. *Id.* at 227. The ordinance failed to ensure that an applicant would be able to arrange the needed inspections within the thirty-day period. *Id.* "Thus, the city's regulatory scheme allow[ed] indefinite postponement of the issuance of a license." *Id.* Additionally, the Dallas ordinance failed to provide for prompt judicial review if a license was denied. *Id.* at 229.

Plaintiffs argue that the Memphis ordinance, like the Dallas ordinance, does not meet the standards articulated in *City of Dallas* because it does not ensure prompt judicial review. We agree. The ordinance provides for the appeal of adverse decisions by common law writ of certiorari. *See* § 20-124(6). Although defendants correctly state that review of administrative decisions by writ of certiorari is expressly authorized by statute in Tennessee, there is no guarantee of prompt judicial review. Under Tennessee law, once a writ is issued, the Chief of Police would be directed to immediately provide a transcript. *See* Tenn. Code Ann. § 27-9-109. No time limit, however, is placed upon compliance. *Id.* Additionally, after the transcript is provided, the appeal will not be heard for at least ninety days. *See* Tenn. Code Ann. § 27-9-111. Although the appeal would have precedence over other litigation, there is no assurance that it would be scheduled immediately at the end of ninety days. The ordinance, therefore, is plagued by the same indefinite delays that rendered the

ordinance in *City of Dallas* unconstitutional. *See also Redner v. Dean*, 29 F.3d 1495, 1497-98 (11th Cir. 1994) (holding that similar ordinance failed to provide adequate safeguards where administrative hearing was scheduled "as soon as Board's calendar will allow.")

Moreover, even if the Chief of Police immediately supplies a transcript and a hearing is held at the end of ninety days, a permit applicant would still have to wait three to five months for judicial review. An applicant may wait sixty days before an initial hearing before the Director of Police Services and then -- at minimum -- ninety days before judicial review. Although the Supreme Court has not expressly defined prompt judicial review, we believe that potential delays of over five months are impermissible. In *Southeastern Promotions, Ltd., v. Conrad*, 420 U.S. 546, 562 (1975), for example, the Court held that a delay of more than five months was excessive. In *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 373-74 (1971), the Court construed 19 U.S.C. § 1305(a) to require that forfeiture proceedings for obscene materials be initiated within fourteen days and concluded within an additional sixty days. Accordingly, we hold that the licensing scheme fails to provide sufficient procedural safeguards and is unconstitutional.

Plaintiffs also argue that the licensing scheme violates the requirement in *City of Dallas* that the status quo be maintained pending judicial review. Specifically, plaintiffs contend that an applicant denied a permit must be allowed to operate pending judicial review. The status quo for a business seeking a permit to begin operating a sexually oriented business, however, is non-operation. The city, therefore, does not need to allow operation pending review. Additionally, the ordinance has been amended to allow sexually oriented businesses in operation at the time the ordinance becomes effective to continue operating while their applications are pending. At least in the case of a permit denial, *City of Dallas* doe not require more. *See* 493 U.S. at 228 ("[T]he licensor must make the decision

whether to issue the license within a specified and reasonable time period during which the status quo is maintained, and there must be the possibility of prompt judicial review in the event that the license is erroneously denied."); *TK's Video, Inc. v. Denton County, Tex.*, 24 F.3d 705, 708-09 (5th Cir. 1994) (holding that only businesses in operation at time the ordinance was enacted must be allowed to operate during the application process).

B. *Content-Neutral Time, Place and Manner Analysis*

Plaintiffs next argue that the ordinance is not content neutral because it targets sexually oriented businesses. In *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 46-47 (1986), the Supreme Court held that regulations aimed at the secondary effects of adult theaters, rather than the content of films shown, were properly analyzed as content-neutral time, place, and manner restrictions. The Court held that such regulations were not content-based merely because they distinguished between adult theaters and other kinds of theaters. *Id.* at 47. *See also Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976) (upholding Detroit zoning ordinance aimed at secondary effects of adult theaters).

Like the zoning ordinance in *Renton*, the Memphis ordinance is aimed at the secondary effects of adult oriented businesses. The Preamble to the ordinance states that the Memphis City Council concluded that there were serious secondary effects, such as crime and neighborhood deterioration, associated with the proliferation of sexually oriented businesses within the city. The ordinance does not attempt to ban such businesses, nor does it pass judgment on the content of the products sold or entertainment provided by sexually oriented businesses.

The ordinance, therefore, is properly analyzed as a content-neutral regulation under the standards set forth in

United States v. O'Brien, 391 U.S. 367 (1968).[5] To withstand constitutional scrutiny, the regulation must (1) be within the constitutional powers of government; (2) further a substantial government interest; (3) the government interest must be unrelated to the suppression of free expression; and (4) the regulation must pose an incidental burden on First Amendment freedoms that is no greater than is essential to further the government interest. *Id.* at 377. There is no doubt that the ordinance meets the first three requirements. Communities have a legitimate and substantial interest in controlling the secondary effects associated with sexually oriented businesses, and such regulation is within the constitutional powers of government. *See Renton*, 475 U.S. at 50; *American Mini Theaters*, 427 U.S. at 71. Additionally, as discussed above, the ordinance is not aimed at the suppression of First Amendment rights. *See Renton*, 475 U.S. at 47. We now turn to the provisions challenged by plaintiffs to determine whether each provision furthers the government interest in minimizing secondary effects without posing more than an incidental burden on First Amendment rights.

1. ***Shareholder Disclosure Requirements***

The ordinance requires that if a business entity rather than an individual operates a sexually oriented business, each person with an ownership interest must sign the application and meet all qualification requirements. *See*

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[5] The Supreme Court has used two tests to analyze content-neutral regulations. In *City of Renton*, the Supreme Court, citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), examined whether the zoning restriction served a substantial government interest, allowed for reasonable alternative means of communication, and was narrowly tailored. *See* 475 U.S. at 50-52. In *Clark*, the Supreme Court applied both the above test and the *O'Brien* test and noted that there was "little, if any" difference between the two. *Id.* at 298. *See also City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804-05 (1984) (analyzing a municipal regulation of signs on public property under *O'Brien*).

§ 20-122(a)(5). Plaintiffs argue that this requirement serves no legitimate purpose because shareholders normally have no responsibility for the everyday operation of a business. The District Court upheld this requirement, reasoning that it was narrowly tailored to further the city's legitimate interest in combatting crime. The District Court noted that the city had found that sexually oriented businesses were often operated by dummy corporations and individuals using aliases.

We agree that the City has a legitimate interest in identifying those who are legally accountable for the operation of a sexually oriented business, and perhaps those who have a controlling or significant share in such a business. The requirement that every person with any ownership interest, regardless of how small, sign the application, however, is impermissibly broad. *See Acorn Invest., Inc. v. City of Seattle*, 887 F.2d 219,226 (9th Cir. 1989) (invalidating similar disclosure provision). Additionally, such disclosure may chill protected expression. *See TK's Video*, 24 F.3d at 709. Accordingly, we hold that this provision is invalid.

2. ***The Requirement to Operate in a Peaceful and Law-Abiding Manner***

The ordinance provides that the Chief of Police Services may deny the issuance of a permit, or may suspend an existing permit, if an applicant or permittee "has demonstrated an inability to operate or manage a sexually oriented business premises in a peaceful and law-abiding manner, thus necessitating action by law enforcement officers." *See* § 20-122(b)(1)(f) and 123(a)(5). Plaintiffs argue that this provision is impermissibly vague and broad. We agree. Although, as discussed below, plaintiffs lack standing to challenge most of the revocation and suspension provisions, the overbreadth doctrine permits plaintiffs to challenge this aspect of the suspension regulations. *See City of Lakewood*, 486 U.S. at 755-56.

This provision provides no criteria to determine what kind of conduct will result in a permit denial or suspension. Is a sexually oriented business subject to permit suspension if the police are called to the premises once, or several times a week? Does a business manager risk suspension by calling the police to report patrons who are engaging in illegal behavior? Presumably, the city desires the cooperation of the permittees to combat criminal activity at and around sexually oriented businesses. Additionally, there could be many conditions at a business "necessitating action by law enforcement officers" that are unrelated to a manager's ability to lawfully operate the business.

The District Court reasoned that although the terms of this provision were not precise, the ordinance as a whole made clear that "demonstrated inability" meant that actual violations of the law had occurred on the business premises. Other provisions of the ordinance, however, already allow for denial, suspension or revocation of a permit for enumerated violations of the law. We, therefore, conclude that this provision is impermissibly vague and vests unbridled discretion in the hands of the Chief of Police Services.

3. *Other Disabling Provisions*

In addition to the inability to operate the business in a peaceful manner, the ordinance lists other "disabling factors" that either bar issuance of a permit, or are cause for permit suspension or revocation.[6] Suspensions last up

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[6]Disabling factors for issuance of a permit include being underage, overdue in payment of taxes or fines related to the business, failure to provide necessary information or providing false information on the application, failure to pay the permit fee, conviction of certain crimes within a specified time period by permit applicant or spouse, or being in current violation of the ordinance. *See* § 20-122(b)(1) and (b)(3). Disabling factors that constitute grounds for suspension include failure to comply with enumerated sections of the ordinance, excessive use of alcohol on the premises, refusal of inspections, and knowingly

to thirty days; revocations last up to five years. *See* § 20-123(a), 123(b)(5). Plaintiffs challenge both the specific disabling factors, as well as the length of the suspensions and revocations.

The District Court held that plaintiffs lacked standing to challenge any of the disabling factors for suspension and revocation, and lacked standing to challenge prior convictions as a grounds for denial of a permit. The District Court, however, upheld the disabling factors other than criminal convictions for permit issuance. Defendants argue that plaintiffs lack standing to challenge any of the disabling provisions for permit issuance, suspension, or revocation. We agree. Plaintiffs have not alleged that any of the disabling factors that would bar the issuance of a permit apply to them. *See City of Dallas*, 493 U.S. at 230-36 (holding that plaintiffs have no standing to challenge disability provisions where record contained no allegations that they were subject to provisions). Although one of the plaintiffs alleges he was convicted of a disabling crime in the past, he concedes that the conviction would not bar a permit because the period of disability has passed. *Id.* Nor have plaintiffs demonstrated that they have standing to challenge the disabling factors for suspension or revocation. *Id.* at 235.

Accordingly, we hold that with the exception of the provision discussed above in part I(B)(2), plaintiffs have no standing to challenge the disabling provisions for permit issuance, suspension or revocation. We, therefore, vacate

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permitting gambling on the premises. *See* § 20-123(a). Grounds for revocation include: providing false or misleading information on the application, permitting the possession, use or sales of controlled substances on the premises, allowing prostitution on the premises, operating while the permit is suspended, conviction of an enumerated offense, allowing sex on the premises, delinquency in taxes related to the business, or if an employee or independent contractor of the operator has been convicted twice in the past twelve months of committing certain enumerated crimes on the premises. *See* § 123(b).

that portion of the District Court's opinion that holds otherwise.

II. *The Zoning Regulations*

The ordinance regulates the location of sexually oriented businesses. Such businesses may not locate within 1500 feet of a church, an elementary or secondary school, a boundary of a residential or landmark district, a public park, a property line of a lot devoted to residential use, or another sexually oriented business. *See* § 20-126(a) and (b). Any sexually oriented business that is operating in violation of the zoning provisions at the time of the ordinance's enactment is deemed a nonconforming use. *See* § 20-126(f). The ordinance contains an "amortization" provision that permits the nonconforming use to continue for not more than one year. *Id.* The District Court held that this "amortization" provision was contrary to both Tennessee law and the city charter. Section 156 of the city charter, codified in chapter 165 of the Private Acts of 1921, provides:

> The lawful use of a premises existing at the time of adoption of an ordinance under the provisions of this Act, although such use does not conform to the provisions of such ordinance, may be continued; but if such nonconforming use is discontinued, any future use of said premises shall be in conformity with provisions of ordinances and regulations adopted under the authority of this Act.

Section 13-7-208(b) of the Tennessee Code also provides that in the event of a change in zoning restrictions:

> any industrial, commercial or business establishment in operation, permitted to operate under zoning regulations or exceptions thereto prior to the zoning change shall be allowed to continue in operation and be permitted; provided, that no change in the use of the land is undertaken by such industry or business.

This provision applies to municipal zoning insofar as it is consistent with the relevant municipal (private) act. *See* Tenn Code. Ann. § 13-7-210. The District Court concluded that the city charter and state law were consistent, and that the amortization provision was in violation of both.

Defendants argue that the "may be continued" language in the city charter refers to the city's authority to allow nonconforming uses to continue, and does not give an entity engaged in a nonconforming use the right to continue the nonconforming use. Because section 13-7-208 of the Tennessee Code was not intended to preempt inconsistent municipal zoning, defendants reason that the city charter alone applies. Defendants, however, fail to provide any support for their novel reading of the city charter. Indeed, defendants point to sections of the city's zoning code that only confirm the District Court's interpretation of the city charter.[7] The District Court's grant of summary judgment, therefore, is affirmed.

III. *Conclusion*

Accordingly, the District Court's judgment is AFFIRMED in part, REVERSED in part, and VACATED in part. We remand for further proceedings consistent with this opinion.

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[7]Section 30 of the City zoning code states that nonconforming uses are allowed to continue, subject to certain constraints such as prohibitions on expanding.

APPENDIX C — ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE, WESTERN DIVISION FILED MAY 14, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. 90-2874-G

EAST BROOKS BOOKS, INC., et al.,

Plaintiffs,

vs.

CITY OF MEMPHIS, et al.,

Defendants.

No. 90-2956-G

STEVE C. COOPER, et al.,

Plaintiffs,

vs.

DR. W.W. HERENTON, et al.,

Defendants.

Appendix C

No. 91-2098-G

AMALGAMATED TAL-WEST, INC., et al.,

Plaintiffs,

vs.

CITY OF MEMPHIS, et al.

Defendants.

No. 91-2078-G

PETE PATEL, et al.,

Plaintiffs,

vs.

CITY OF MEMPHIS, et al.,

Defendants.

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

Before the court are the parties' cross-motions for summary judgment in three consolidated actions challenging the constitutionality of Ordinance 4013[1] of the City of Memphis.

1. The issues relating to the permit provisions of Ordinance 4013 are the only issues remaining for resolution by the court in these cases. A challenge to Ordinance (Cont'd)

Appendix C

Ordinance 4013 regulates the operation of sexually-oriented businesses in the city. The motions relate to the ordinance's permit provisions.

Plaintiff in case 90-2874 is East Brooks Books, Inc. d/b/a Getwell Bookmart and Airport Adult Theatre, a corporation that owns and operates two adult bookstores in the city.[2] Plaintiffs in

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(Cont'd)

3958, raised in case 90-2956, was severed by an order of February 20, 1991, jointly signed by United States District Judge Jerome Turner and Senior United States District Judge Robert M. McRae. The case was later resolved by Judge McRae. At that point the remaining issues in the cases involved Ordinance 3988, and these issues were to be resolved by Judge Turner. Ordinance 3988 was replaced, however, by Ordinance 4013, and the parties amended their pleadings accordingly. In June 1992 Judge Turner transferred the issues pending before him to this court for resolution.

The original transfer from Judge Turner involved four cases. By order of December 4, 1992, this court struck plaintiffs Amalgamated Tal-West, Inc. d/b/a Danny's and Amalgamated Tal-East d/b/a Gigi's as plaintiffs in case 91-2098. The remaining plaintiffs in that case, Herbert Rook d/b/a Super Chics, Lisa Ralston and Dawn Biondo, did not appear in this court at the status conference conducted by the court on July 14, 1992, and apparently have not otherwise participated in the proceedings since their counsel withdrew in early 1992. The notice of the status conference stated that failure to appear could result in dismissal of the case. Accordingly, case 91-2098 is dismissed in its entirety for failure to prosecute, and the clerk is directed to close the file in that case.

Plaintiffs originally also challenged a part of the restrictive zoning regulations of Ordinance 4013. On August 17, 1992, the court granted summary judgment in their favor on the zoning issue and found that § 20-126(f) of Ordinance 4013 violated the city charter and state law.

2. Plaintiffs Barbara J. Childress and Malcolm R. Rollins, employees of East Brooks Books, were dismissed from the case by order of December 4, 1992.

case 90-2956 are Steve C. Cooper; Southern Entertainment Management Co., Inc. d/b/a Club Tiffany, a corporation solely owned by Cooper that operates an adult night club in Memphis featuring exotic dancing; and three of Cooper's employees at Club Tiffany, dancers Lisa Wright, Stacy Collins and Betty Powers. Plaintiff in case 91-2078 is Pete Patel, the managing partner of several adult motels in the city. Defendants in all three cases are the City of Memphis, Mayor W.W. Herenton and Police Director Melvin Burgess.

Ordinance 4013 was passed by the Memphis City Council on January 15, 1991, and became effective when signed by the Mayor of Memphis on January 29, 1991. The ordinance imposes special permit and inspection requirements, as well as restrictive zoning regulations, on all sexually-oriented businesses in the city.[3] As stated in § 20-121(a), the purpose of the ordinance is "to regulate sexually oriented business to promote the health, safety, morals, and general welfare of the citizens of the city and to establish reasonable and uniform regulations to prevent the continued concentration of sexually oriented businesses within the city."[4] The Preamble to Ordinance 4013 states that the

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3. The Ordinance defines a sexually oriented busines as "an adult arcade, adult bookstore or adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, escort agency, nude model studio, or sexual encounter center or for [certain purposes] adult telecommunications business." § 20-121(b)(22). Each of these classifications of sexually oriented businesses is separately defined.

4. Presumably anticipating a constitutional challenge to the ordinance, § 20-121(a) also provides:

> The provisions of this chapter have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including

(Cont'd)

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Memphis City Council found that there were "serious and adverse secondary effects," particularly crime and neighborhood deterioration, associated with the proliferation of sexually-oriented businesses in the city. The Council also found that the unregulated operation of sexually-oriented businesses "begets unsanitary conditions and unhealthy and unwholesome activities at such businesses."[5] The permit and inspection requirements and zoning provisions of Ordinance 4013 are intended to counter these adverse secondary effects.

The general requirements imposed on operators of sexually-oriented businesses are as follows.[6] Any person wishing to operate a sexually-oriented business must apply for an operator's permit by filling out a form provided by Memphis' director of police services.[7] The director of police services is required to

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> sexually oriented materials. Similarly, it is neither the intent nor effect of this chapter to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market.

5. The Preamble states that the Memphis City Council reached its conclusions after reviewing a 1977 study of the effects of adult businesses on the city of Los Angeles, a similar study done in Phoenix, reports prepared by the Memphis Vice Squad and the Topless Club Enforcement division, and reports of the unusually large number of criminal arrests made in and around sexually oriented businesses generally.

6. The ordinance itself is reproduced in full in an Appendix to this Order.

7. The director of police services may delegate responsibility for the issuance of permits to "his designated agent," presumably an inferior officer. § 20-121(b)(8).

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issue an operator's permit within thirty days, except that a permit shall not issue if the applicant possesses certain disabling factors.[8] A permit may be issued only in the name of a natural person, § 20-122(a)(7), and permittees must also obtain permits for their employees or any independent contractors they hire. § 20-122(a)(8).

The ordinance imposes disclosure requirements regarding the ownership of sexually-oriented businesses[9] and also contains civil disability provisions, preventing applicants from obtaining operating permits or employee permits if they have been convicted of certain enumerated crimes, including violations of the ordinance itself, within a specified time period. § 20-122(b)(1)(D), (H). All sexually-oriented businesses are subject to a $5,000 annual permit fee;[10] employee permits are $15 annually. § 20-122(c).

Sexually-oriented businesses are subject to inspections by

8. A permit shall not be issued to an applicant who is underage, overdue in the payment of taxes or fines related to the business, has failed to provide necessary information or has provided false information on his application, has not paid the permit fee, has been convicted of certain crimes within a specified time period, is currently in violation of the Ordinance, or "has demonstrated an inability to operate or manage a sexually oriented business premises in a peaceful and law-abiding manner, thus necessitating action by law enforcement officers." § 20-122(b)(1), et seq.

9. The ordinance provides "[i]f a person who wishes to operate a sexually oriented business is other than an individual, each individual who has any interest in the business mut sign the application for a permit as applicant." § 20-122(a)(5).

10. This permit fee presumably applies to each and every location of a sexually-oriented business without regard to common ownership.

the police department, health department, fire department, housing and community development division and construction code enforcement division at any time the premises are occupied or open for business. § 20-122(d). The ordinance requires that the director of police services revoke or suspend an operator' permit if certain enumerated offenses are committed either by the permittee or on the premises.[11]

The ordinance provides for written notice of the denial, revocation, or suspension of a permit, specifies time limits on the right to appeal, and requires the scheduling of an appeal hearing with the director of police services within sixty days of a denial, revocation, or suspension.[12] The ordinance contains specific provisions related to enforcement, classifies violations as misdemeanors, and provides for the imposition of civil fines and for injunctive proceedings against businesses and individuals

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11. Specifically, the permit must be suspended if the operator fails to comply with enumerated sections of the ordinance, has used alcohol on the premises excessively, has refused to allow inspection, has knowingly permitted gambling, or has "demonstrated inability to operate or manage [the business] in a peaceful and law-abiding manner thus necessitating action by law enforcement officers." § 20-123(a). The operator's permit must be revoked if the permittee provides false or misleading information on his application, has permitted the possession, use or sale of drugs on the premises, has allowed prostitution on the premises, has operated while the permit was suspended, has been convicted of an enumerated offense, has employed persons unqualified under the ordinance twice within one year, has allowed sex on the premises, or is delinquent in taxes related to the business. § 20-123(b).

12. *See* § 20-124. The director's decision must be made in writing to all parties within five days of the hearing. *Id.* Any appeal from the director's decision must be made by common law writ of certiorari within thirty days of the director' written decision. *Id.*

found to be in violation of the ordinance.[13] §§ 20-134 and 135.

The plaintiffs attack Ordinance 4013 on a variety of bases. They maintain that the general requirement that all sexually-oriented businesses obtain a permit is an unconstitutional prior restraint. Moreover, they assert that, even should the court find that the ordinance is content-neutral and not a prior restraint, the permit provisions are overbroad, do not further a significant government interest, and do not provide reasonable or ample alternative means of communication — that is, that the ordinance's provisions do not amount to permissible time, place and manner restrictions. In addition, plaintiffs attack many of the ordinance's specific provisions and requirements.

1. *Standing.* Initially, the court must determine whether plaintiffs have standing to make the asserted challenges. Plaintiffs make a facial challenge to Ordinance 4013. Where first amendment interests are involved, an overbroad regulation may be subject to a facial challenge and invalidation, even though its application in that particular case is constitutionally unobjectionable. *See, e.g., City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 798-99 (1983). The Supreme Court has permitted challenges to ordinances under the overbreadth doctrine in cases "where every application creates an impermissible risk of suppression of ideas, such as an ordinance

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13. The ordinance contains additional regulations for escort agencies, nude modeling studios, adult theatres and adult motion picture theatres, and adult motels. §§ 20-128 to 20-131. Operators wishing to exhibit sexually-explicit films or videos must file, with their permit application, a diagram of the premises which details the location of manager's station and the location of overhead lighting. § 20-132. The interior of the premises must be configured such that the whole floor area is visible from at least one manager's station. *Id.* The ordinance also contains provisions governing the "display" of sexually explicit material to minors. § 20-133.

that delegates overly broad discretion to the decisionmaker, and in cases where the ordinance sweeps too broadly, penalizing a substantial amount of speech that is constitutionally protected." *Forsyth County Georgia v. Nationalist Movement,* 112 S.Ct. 2395, 2401 (1992) (citations omitted). When plaintiffs' claims "are rooted in the First Amendment, they are entitled to rely on the impact of the ordinance on the expressive activities of others as well as their own." *Schad v. Borough of Mount Ehraim,* 452 U.S. 61, 66 (1981).

Plaintiffs here operate four of the ten types of sexually-oriented businesses classified by the ordinance. The bookstores operated by East Brooks Books are presumably classified as either "adult bookstores" or "adult motion picture studios," or perhaps both, under the terms of the ordinance. Cooper's establishment is an "adult cabaret" and plaintiffs Wright, Collins, and Powers are employees of Cooper and dance at his business.[14] Patel's motels are classified as "adult motels" under the ordinance.[15]

As to the threshold requirement that all sexually-oriented businesses apply for and obtain an operator's permit, there is no doubt that plaintiffs East Brooks Books, Cooper and Southern Entertainment Management, and Patel each have standing to

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14. Wright, Collins and Powers are characterized in the pleadings as private contractors who are engaged by Cooper to dance in his clubs. Because the ordinance requires an employee's permit for either actual employees or "independent contractors," the court need not engage in a prolonged analysis of these plaintiffs' actual business relationship with Cooper.

15. No "adult arcades," "escort agencies," "adult telecommunications businesses," "nude modeling studios," or "sexual encounter centers" have challenged the ordinance's constitutionality.

raise a facial challenge. Although facial challenges to laws are generally disfavored, they are permitted where a licensing scheme is challenged on first amendment grounds for placing "unbridled discretion" in the hands of the decisionmaker and where the regulation challenged is overbroad. *See FW/PBS v. Dallas*, 493 U.S. 215, 223 (1990) (citing *Taxpayers for Vincent*, 466 U.S. at 798 (1984)). East Brooks Books, Cooper and Southern Entertainment Management, and Patel own the types of businesses that would require an operator's permit under the ordinance. Each of these plaintiffs alleges that the general permit requirement will operate as a prior restraint on the exercise of their rights under the first amendment or, alternatively, that the ordinance fails to satisfy the limits on time, place and manner regulations set down in several decisions of the United States Supreme Court. They argue that the permit provisions are overbroad and vest excessive discretion in the hands of the licensing official. The City of Memphis does not deny that these plaintiffs are subject to the ordinance's general permit requirement and the court accordingly concludes that they have standing to challenge the provisions mandating that every sexually-oriented business obtain an operator's permit.[16]

The plaintiffs also challenge many of the ordinance's specific provisions. The Supreme Court has stated that standing

16. The defendants somewhat disingenuously point out that only Cooper has alleged that he would actually apply for a permit were Ordinance 4013 to become effective. While the court is mindful that standing in constitutional challenges is to be strictly construed and that standing is not to be presumed but must "affirmatively appear in the record," *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990) (quoting *Mansfield C. & L. M. R. Co. v. Swan*, 111 U.S. 379 (1884)), a party may challenge a licensing statute whether or not he or she was denied a permit, or whether one was even ever sought. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969). The failure of Patel and East Brooks Books to allege that they would in fact apply for permits does not defeat standing.

is not to be inferred argumentatively from the parties' declarations, but rather "must affirmatively appear in the record." *FW/PBS*, 493 U.S. at 231 (citations omitted). As in every case, the plaintiffs must have a direct stake in the outcome to satisfy Article III case or controversy requirements. *See Genusa v. City of Peoria*, 619 F.2d 1203, 1210 (7th Cir. 1980). The court interprets the ordinance to find that most of the specific requirements imposed are applicable to plaintiffs East Brooks Books, Cooper and Southern Entertainment Management, and Patel: they own businesses which must apply and pay for permits as both operators and as employers, and must comply with the ordinance's provisions or be forbidden to conduct business. *See Brothers Three Enterprise, Inc., et al. v. Knox County, Tennessee*, Memorandum Opinion, No. 3-89-35 (E.D. Tenn., February 4, 1989). Many of the ordinance's specific provisions are subject to a facial challenge, as they are arguably overbroad or vest undue discretion in the licensing official. Other provisions, however, may be challenged only as they apply to these specific plaintiffs. Ordinance 4013 contains a severability clause, see Ordinance 4013, § 2, thus necessitating an evaluation of standing with respect to each specific challenge. The court will therefore address the provisions that plaintiffs lack standing to challenge in the relevant sections below.

Finally, the court notes that the dancer plaintiffs — Wright, Collins and Powers — have standing only to challenge the permit provisions which are applicable to employees or independent contractors.

2. *Constitutionality of the Ordinance Under the* FW/PBS v. City of Dallas *Standard.* Ordinance 4013 is modeled after a Dallas, Texas ordinance regulating sexually-oriented businesses which has already been subject to a constitutional challenge. The

plaintiffs in this action raise substantially the same claims as the plaintiffs in the Dallas litigation.

In *FW/PBS v. Dallas*, 493 U.S. 215 (1990), the United States Supreme Court struck down the Dallas ordinance's permit requirement, finding that the statute failed to provide procedural safeguards adequate to protect the speech rights of the regulated businesses and thus constituted an impermissible prior restraint under *Freedman v. Maryland*, 380 U.S. 51 (1965). In *Freedman*, the Supreme Court struck down a Maryland motion picture censorship statute, holding that the statute's procedural standards did not provide adequate protection against the abridgement of First Amendment rights. 380 U.S. at 60. The Maryland statute permitted the State Board of Censors to deny approval or permission to exhibit any film the Board found to be obscene, to debase or corrupt morals, or to incite crime. *Id.* at 52. The Court enunciated a three-part test to determine whether such a statute provided adequate procedural safeguards: (1) any restraint prior to judicial review may be imposed only for a definite time period during which the status quo is maintained; (2) prompt judicial review of the licensing authority's decision must be available; and (3) the censor must bear the burden of proving in court that the material in question is not protected by the First Amendment. *Id.* at 58-59.

The *FW/PBS* Court held that because the Dallas ordinance did not require the licensing authority to make a decision whether or not to issue a license within a specified time period and because it did not provide prompt judicial review of a license denial, it could not stand under *Freedman*. *See FW/PBS*, 493 U.S. at 229.

A plurality of the *FW/PBS* Court, however, declined to

require that the Dallas ordinance comply with the full scope of the *Freedman* test. The plurality noted that Dallas licensing officials did not exercise discretion by evaluating the content of any constitutionally-protected speech, and instead reviewed only the qualifications of each applicant for a permit. *Id.* at 607. Such a review amounted to a merely "ministerial action" which was not presumptively invalid under the first amendment.[17] *Id.* For this reason, the Supreme Court held that the *Freedman* requirement that the licensing authority bear the burden of proving to a court that the material is unprotected by the First Amendment was not necessary in the context of the Dallas licensing scheme. *FW/PBS,* 493 U.S. at 229.

In order to resolve the parties' cross-motions for summary judgment, therefore, the court must first determine whether the ordinance provides adequate procedural safeguards under the modified *Freedman* test enunciated in *FW/PBS.* If the ordinance does not provide such safeguards, it is an unconstitutional prior restraint and cannot stand.

Under *FW/PBS,* a licensing scheme for first amendment-protected businesses must (1) place a reasonable and fixed time period within which the licensing authority must make a decision to grant or deny a license and (2) provide for prompt judicial review of a license denial. *See* 490 U.S. at 229. Ordinance 4013 provides that the director of police services shall approve the issuance of a permit within thirty days of application unless the applicant possesses one of the enumerated disabling factors. § 20-122. Section 20-124 sets forth the procedures for hearing

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17. The court found that the Dallas licensing scheme did not present the "grave dangers of a censorship system" and was thus distinguishable from the statute struck down in *Freedman.* 493 U.S. 228 (quoting *Freedman* at 58-60).

and appeal upon the denial of an application, or upon the suspension or revocation of a permit. It provides for written notice to the applicant or permittee and for an opportunity to appeal within ten calendar days of receipt of that notice. Section 20-124 also provides that any appeal hearing must be scheduled within sixty days of the notice and that a permit may not be suspended or revoked before the hearing, or before sixty days have passed, whichever is earlier.[18] The director of police services must make a decision on the appeal within five days of the conclusion of the hearing.

Because Ordinance 4013 imposes fixed and definite time limitations on the licensing authority's decision on whether to issue a permit, it complies with the test set forth in *FW/PBS*. The Dallas ordinance placed a time limit on the licensing authority's decision, but also subjected sexually-oriented businesses to pre-approval inspections by various agencies upon which no time limits were placed. *See* 490 U.S. at 227. Ordinance 4013 requires no such pre-approval inspections, and the specific time limitations placed on the decision-making process therefore provide adequate procedural protections under both *FW/PBS* and *Freedman*.

The *FW/PBS* Court also required that any licensing scheme involving the exercise of first amendment rights must provide an avenue for prompt judicial review to minimize the suppression of protected speech in the event a license is erroneously denied. 493 U.S. at 228-29. Ordinance 4013 provides a mechanism for judicial review by common law writ of certiorari. § 20-124(6).

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18. The only exception to provision against suspension or revocation prior to a hearing is when the health officer determines there is health risk or risk of disease posed by the location. § 20-124(4).

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Plaintiffs argue that review by common law writ is not the "meaningful review" required when first amendment interests are at stake. Under Tennessee law, however, common law writ of certiorari has long been available and commonly exercised to review the actions of administrative tribunals. *See State v. Johnson*, 569 S.W.2d 808, 812 (Tenn. 1978). Under the common law writ, the reviewing court examines the legality of the lower court proceeding and the conclusions of law, or mixed fact and law, reached by the administrative body below. *See Pack v. Royal-Globe Insurance Co.*, 457 S.W.2d 19, 22 (Tenn. 1970); *Boyce v. Williams*, 215 S.W.2d 272 (1965). The only question for determination by the court on the common law writ is whether the administrative body exceeded its jurisdiction, or acted illegally, arbitrarily or fraudulently. *Hoover Motor Exp. Co. v. Railroad & Public Util. Comm'n*, 261 S.W.2d 233, 237-38 (Tenn. 1953). "Acting illegally," however, encompasses findings of fact for which there is no legally sufficient basis and therefore, under the writ, the reviewing court must review the facts considered and record established by the administrative body. *Id.*

The court therefore concludes that the ordinance does provide for prompt and meaningful judicial review of the decision of the director of police services, minimizing the danger of the suppression of protected speech. Accordingly, Ordinance 4013 lacks the procedural infirmities of the Dallas ordinance struck down by the Supreme Court in FW/PBS.

3. *The Ordinance As a Content-Neutral Time, Place and Manner Restriction.* The court now turns to the second part of the inquiry on the ordinance's constitutionality — whether the ordinance is a content-neutral time, place, and manner regulation.[19]

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19. The Fifth Circuit Court of Appeals had upheld the Dallas ordinance in its (Cont'd)

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Taken as a whole, Ordinance 4013 regulates the time, place and manner of expression, and is not, as plaintiff argue, a prior restraint on expression. A prior restraint arises where the context of expression protected under the first amendment is subject to government censorship. *See Near v. Minnesota*, 283 U.S. 697 (1931). The United States Supreme Court has stated that "[t]he mere fact that the commercial exploitation of material protected by the first amendment is subject to zoning and other licensing requirements is not a sufficient reason for invalidating these ordinances." *Young v. American Mini Theatres*, 427 U.S. 50, 62 (1976).

The permit requirement challenged here is aimed at the secondary effects associated with the proliferation of sexually-oriented businesses and not at the future expression of those businesses. Although the enforcement of the ordinance may have an impact on some constitutionally-protected expression, there is no indication in the record that it was enacted to limit or inhibit protected speech based on the content of that speech. To the contrary, it is clear on the face of the ordinance that it was enacted to combat the well-documented secondary effects associated

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entirety as a content-neutral, time, place and manner restriction intended to control the adverse secondary effects associated with the operation of sexually oriented businesses. *See FW/PBS v. City of Dallas*, 837 F.2d 1298 (5th Cir. 1988); *see also Dumas v. City of Dallas*, 648 F.Supp. 1061 (N.D. Tex. 1986). Because the Supreme Court found the Dallas ordinance lacked adequate procedural safeguards, however, the Court did not reach the question of whether the Dallas ordinance, as the city of Dallas contended, was a constitutional time, place and manner regulation, properly analyzed under *United States v. O'Brien*, 391 U.S. 367 (1968), *Renton v. Playtime Theatres Inc.*, 475 U.S. 41 (1986), and other decisions of the United States Supreme Court.

20. *See* Preamble to Ordinance 4013.

with the operation of sexually-oriented businesses.[20] These secondary effects include crime, the deterioration of the surrounding area, unsanitary conditions and the spread of communicable diseases. *Id.*

Neither the First Amendment nor the Equal Protection Clause of the Fourteenth Amendment prohibits the city of Memphis from classifying sexually-oriented businesses differently from other businesses, even if first amendment rights are affected by such regulation. *Arcara v. Cloud Books, Inc.*, 478 U.S. 679 (1986); *Paris Adult Theatre I v. Slayton*, 413 U.S. 41 (1986); *Renton v. Playtime Theatre*, 475 U.S. 41 (1986); *Young v. American Mini Theatres*, 427 U.S. 50 (1976).

When "speech" and "nonspeech" elements are intertwined and regulation of the nonspeech conduct or portion is justified, incidental limitations on the first amendment may be imposed. *See Ellwest Stereo Theater. Inc., v. Boner*, 718 F.Supp. 1553, 1562 (M.D. Tenn. 1989). For this reason, and despite the fact that the ordinance has some incidental impact on certain first amendment interests, the ordinance is not presumptively invalid as a prior restraint.

In *United States v. O'Brien*, 391 U.S. 367 (1968), the Supreme Court held that a regulation may withstand scrutiny under the first amendment despite its impact on first amendment interests if the regulation (1) is within the constitutional power of government, (2) furthers an important or substantial government interest, (3) is unrelated to the suppression of free expression, and (4) poses an incidental burden on first amendment freedoms that is no greater than is essential to the government interest. *Id.* at 377. *See also Renton*, 475 U.S. at 48 (1986); *Young*, 427 U.S. at 79 (1976) (Powell, J., concurring). Further, incidental burdens on protected expression may be analyzed under *O'Brien* as time,

place and manner regulations. *See Renton*, 475 U.S. at 47-49. Such time, place and manner regulations are permissible if they are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels for communication. *Renton*, 475 U.S. at 47-50;[21] *see also Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

Ordinance 4013 is valid under the first three elements of the *O'Brien* test, even without reference to the ordinance's specific terms. It is clearly within the police power of the City of Memphis to enact legislation to counter the well-established adverse secondary effects of sexually-oriented businesses. *See Renton*, 475 U.S. at 48. Nor can it be disputed that the elimination of these secondary effects — crime, deterioration, urban blight, the control of communicable diseases and unsanitary conditions — is a substantial government interest. Third, as the court concluded in the discussion above, the ordinance's purpose is aimed squarely at countering these secondary effects and is unrelated to suppressing the expression of the regulated businesses.[22]

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21. The *Renton* Court analyzed a zoning ordinance that placed various restrictions on adult theaters and held the ordinance constitutional, finding that it was designed to serve a substantial government interest and did not limit alternative channels for communication. *Renton*, 475 U.S. at 47-50.

22. The City Council based its decision to enact this ordinance in part on studies documenting the adverse secondary effects associated with sexually oriented businesses in Los Angeles and Phoenix. In *Renton* the Supreme Court stated that "[t]he First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." 475 U.S at 51-52.

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Having determined that the general license requirement withstands constitutional scrutiny and that the ordinance satisfies the first three elements of the *O'Brien* test, the court must now determine whether the provisions of the ordinance impose an incidental burden on expression that is no greater than is essential to the government's interest. That inquiry must be made independently for each of the ordinance's specific restrictions and requirements.

a. *Licensure requirement as applied.* In addition to challenging the ordinance's general requirement that all sexually-oriented businesses apply for and obtain a permit, the plaintiffs challenge the manner in which the permit requirement is imposed. Plaintiffs argue that the ordinance's permit provisions are overbroad and vest undue discretion in the hands of the licensing official.

Any license requirement related to protected expression under the first amendment must contain narrow, objective and definite standards which the licensing authority must follow. *See Shuttlesworth v. Birminaham,* 394 U.S. 147, 150-51 (1969). On its face, Ordinance 4013 vests no direct "discretion" in the hands of the licensing authority. The ordinance provides that the city's director of police services "shall" issue a permit, unless the applicant is underage, overdue in the payment of taxes or fines related to the business, has not provided the necessary information or has provided false information on the application, has not paid the permit fee, has been convicted of an enumerated crime,[23] or is in violation of one of the provisions of the ordinance. § 20-122(b)(1) *et seq.*

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The plaintiffs have offered no evidence that the purpose of the City Council in enacting Ordinance 4013 was to inhibit or suppress their expression.

23. The provisions of the ordinance which disqualify applicants who have (Cont'd)

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Each of these disabling factor is subject to factual verification and vests no discretion in the director of police services.[24] Various courts have upheld ordinances employing each of these factors to disqualify applicants for sexually-oriented business permits. *See Dumas v. City of Dallas,* 648 F.Supp. 1061, 1073 (N.D. Tex. 1986) (listing decisions upholding these various disqualifying factors). On the record before the court, there is no basis to conclude that any of the factors listed above fail to withstand constitutional scrutiny.

Sections 20-122(b)(1)(F) and 20-123(a)(5) provide that the director of police services may deny the issuance of a permit to an applicant or suspend an operator's permit if the applicant or operator "has demonstrated an inability to operate or manage a sexually oriented business premises in a peaceful and law-abiding manner, thus necessitating action by law enforcement officers." Plaintiffs argue that the ordinance provides no guidance to the director of police services in applying this

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been convicted of enumerated felonies or misdemeanors is addressed more fully below.

24. Section 20-122(a)(3) provides that "[a]n application for a permit must be made on a form provided by the director of police services." Plaintiffs argue that this section vests undue discretion in the licensing official because it does not explicitly state what information the director of police services may require on the application form. The court is wholly unpersuaded by this argument. When read with the ordinance as a whole, the section can only be reasonably interpreted to require such information that will enable the city to effectively enforce the ordinance. The ordinance places very specific restrictions on who may hold a permit and imposes a number of explicitly-delineated regulations on all permit holders. The application form is intended to make available to the city such information as is necessary to implement and administer each of the restrictions and regulations. This section does not vest undue discretion in the director of police services, nor is it unconstitutionally vague.

provision and that the ordinance contains no standards to assist either the licensing authority or the court in defining what is meant by operating in a "peaceful manner" or what constitutes "action by law enforcement officers."

While admittedly "peaceful" and "action by law enforcement officers," are not precise terms, they are limited by other words in the ordinance. In order for the director to deny or suspend a permit on this basis, the operator must also be unable to operate the premises in a law-abiding manner — that is, actual violations of the law must have occurred. The denial or suspension must be based on a demonstration of *inability* to operate the premises in a peaceful and law-abiding manner. Thus, past unlawful activities plus evidence that the operator cannot or will not avoid these in the future must support the decision. The standards of the ordinance are sufficiently narrow and definite to provide guidance to the licensing authority. This provision is therefore constitutional.

b. *Civil Disability Provisions*. Plaintiffs also challenge the provisions of the ordinance which provide that a permit may be denied or revoked if the applicant or permittee is convicted of prostitution, promoting prostitution, violating the obscenity laws, certain offenses involving minors, indecent exposure, rape, statutory rape, sexual battery, incest or criminal attempt, conspiracy or solicitation to commit the above offenses, within a specified period of time. § 20-122(b)(1)(H)(i).

Based on the record before the court, none of the plaintiffs has standing to challenge the civil disability provisions pertaining either to operators or their employees. Only plaintiff East Brooks Books alleges that it has been convicted of an obscenity offense that would disable its application for an

operator's permit. The period of disability imposed under § 20-122(b)(1)(H)(i) has now elapsed, however, and its claim is moot.[25]

c. *Classification and definitions.* Plaintiffs also contend that the ordinance improperly classifies businesses which enjoy first amendment protection with businesses which do not. The Supreme Court has explicitly held that a city is not prevented by either the first amendment or the fourteenth amendment from classifying and regulating adult-oriented establishments differently from other places of entertainment. *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976); *see also Broadway Books, Inc.*, 642 F.Supp at 490.

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25. The court should also note that, even if the plaintiffs had standing to challenge these civil disability provisions, that each is reasonably related to the Ordinance's purpose. The enumerated crimes are prostitution, promoting prostitution, obscenity violations, various offenses involving the exposure of minors to obscene material and the use of minors for obscene purposes, rape, statutory rape, sexual battery, and any attempt, conspiracy, or solicitation to commit any of the above offenses. § 20-122(b)(1)(H). The period of disability is fixed at two or five years, depending on whether the crime was a felony or misdemeanor and on the number of separate convictions.

Each of these crimes is related to one of the central purposes of the ordinance: the control of crime, particularly sex-related crime, in and around the premises of sexually oriented businesses. As each of the crimes is sex-related, and as the period of disability is a fixed length of time, the ordinance is narrowly tailored to serve the governmental interest.

Section 20-122(b)(3) provides that the period of disability also extends to the applicant' spouse. Since no plaintiff has standing to challenge the ordinance's civil disability provisions, no plaintiff may challenge the provision disqualifying an applicant's spouse.

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The central aim of Ordinance 4013 is to combat the adverse secondary effects, including crime and harm to public safety, associated with sexually-oriented businesses. In promulgating this ordinance, the Memphis City Council considered evidence that sexually-oriented businesses, regardless of their particular type, contributed to crime and the general deterioration of the surrounding area.[26] There is no indication whatsoever in the record that the classification scheme was designed to or has the effect of suppressing the expression of businesses protected by the first amendment. The fact that the ordinance arguably has the effect of classifying first amendment-protected businesses with other businesses is not fatal.

Plaintiff East Brooks Books also argues that the definition of adult bookstore is vague and overbroad. In bringing this challenge, however, plaintiff has acknowledged that its businesses are within the scope of the definition of "adult bookstore" or "adult motion picture studio," as defined by the ordinance. The definition is thus sufficiently precise to leave the plaintiff in no doubt that its actions are covered by the ordinance. *See Genusa v. City of Peoria*, 619 F.2d 1203, 1209 (7th Cir. 1980) (finding that plaintiffs lacked standing to challenge definitional provision because the questioned definition was "subject to a narrowing construction" under *Young v. American Mini Theaters*); *see also Dumas v. City of Dallas*, 648 F.Supp. 1061, 1075 (N.D. Tex. 1986) (holding that definitions in Dallas ordinance "are designed to 'give a person or ordinary intelligence fair notice that his contemplated conduct is forbidden by statute,

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26. In particular, the City Council considered the "Study of Effects of the Concentration of Adult Businesses in Los Angeles" and a similar study done in Phoenix. Both of these studies documented the ills associated with the proliferation of adult oriented businesses of various classifications and are contained in the Record filed by the defendant city of Memphis on September 15, 1992.

in light of common understanding and practices' " (citations omitted)).

d. *Revocation and suspension.* Plaintiffs also maintain that the appeal provisions concerning the suspension and revocation of a permit are overbroad and amount to an unconstitutional prior restraint. Plaintiffs have standing to raise a facial challenge to the ordinance's suspension and revocation provisions.

The ordinance provides that the permittee is entitled to written notice of the proposed suspension or revocation of the operator's permit, after which the permittee has ten calendar days to appeal the decision with the director of police services. § 20-124(1). A hearing must then be scheduled within sixty day. § 20-124(3). Suspension or revocation of a permit shall not occur before sixty days after notice was provided of the proposed suspension or revocation, or before a hearing has been held, whichever is first. § 20-124(4).

No permit may be extended during a court appeal of the decision to revoke or suspend the operator's permit without a writ of supersedeas. § 27-124(7). Under Tennessee law, the writ of supersedeas operates to preserve the status quo, allowing the permittee to remain open pending the outcome of its appeal and, pursuant to T.C.A. § 27-8-112, is readily available.

There is no constitutional infirmity with the procedures set forth regarding the suspension or revocation of an operator's permit. While the modified *Freedman* test set forth by the Supreme Court in *FW/PBS* applies to the issuance of permits and not their suspension or revocation, the concern that speech not be suppressed through the delay of the licensing authority is equally valid where the suspension or revocation of a permit is involved.

The ordinance provides notice and an opportunity for a hearing before a permit may be suspended or revoked, and provides a means of prompt judicial review of the decision of the licensing authority. There is thus no danger of an indefinite "delay compel[ling] a speaker's silence." *Riley v. National Federation of the Blind*, 487 U.S. 781, 802 (1988).

Finally, section 20-123(a) and (b) set forth the specific grounds for which an operator's permit may be suspended or revoked. No plaintiff has alleged that he would be subject to any of these grounds for suspension or revocation, nor does the court find grounds upon which the plaintiffs may bring a facial challenge to these provisions.

e. *Disclosure provisions.* Plaintiffs also challenge the ordinance's provisions requir ng the disclosure of ownership information. The ordinance provides that only a "natural person" may hold a permit, § 20-122(a)(7), and that "[i]f a person who wishes to operate a sexually oriented business is other than an individual, each individual who has any interest in the business must sign the application for a permit a applicant." § 20-122(a)(5). Plaintiffs argue that these requirements are vague and overbroad, unduly burdensome, and not sufficiently related to the ordinance's purpose to withstand constitutional muster.

Because corporations are not "natural persons," a corporation cannot hold an operator's permit. Corporate plaintiffs East Brooks Books and Southern Entertainment Management therefore lack standing to challenge this provision. Plaintiff Steve Cooper, however, is entitled under the ordinance to hold a permit and does therefore have standing to challenge this provision.

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The ordinance's disclosure provisions are narrowly tailored to serve the city's interest in combatting crime and ensuring public health and safety and impose no discernible burden on the first amendment rights of the permit holder. These provisions do not significantly burden plaintiffs' expression, while it is apparent that they are necessary to the effective enforcement of the statute. The city has found in the past that sexually-oriented businesses have been operated by individuals using aliases and assumed names, and by dummy corporations. *See* Preamble to Ordinance 4013. The city is entitled to know who is operating these regulated businesses — an application for a permit without a name is meaningless. *See Broadway Books Inc. v. Roberts*, 642 F.Supp. 486, 492 (E.D. Tenn. 1986). One of the central aims of the statute is the control of crime in and around the premises of sexually-oriented businesses. The disclosure of the actual name of permittee promotes accountability, should problems of a criminal nature arise. Such disclosure also enables the qualifications of the permittee to be more easily verified.

There is no merit to a challenge to the disclosure provisions on vagueness grounds. The "interest" to be disclosed is plainly the ownership interest. Further, nothing in the ordinance disqualifies or inhibits a corporation or partnership from operating a sexually-oriented business — the entity simply must disclose the actual names of its owners, stockholders or partners to receive a permit.

The disclosure requirements are narrowly tailored to serve the ordinance's stated purpose, which the court found above to be a significant government interest. The disclosure requirements are therefore constitutionally valid.

Appendix C

f. *Employee permits.* Plaintiffs also challenge the ordinance's requirement that permittees must apply for and obtain employee permits for each of their employees and any independent contractors who are employed at their business. Specifically, plaintiffs claim that the provisions providing for denying, revoking or suspending employee permits are overbroad and a prior restraint, that the civil disability provisions are also overbroad and a prior restraint, and the provisions pertaining to the hiring of independent contractor are overbroad.

Because the ordinance requires operators to obtain permits for their employees, East Brooks Books, Cooper, Southern Entertainment Management and Patel all have standing to litigate the threshold requirement that all employees and independent contractors employed at the business have permits. Because they are employed by Cooper and must qualify under the ordinance's terms for an employee's permit, plaintiffs Wright, Collins and Powers have standing as well.

Plaintiffs' claims as to these provisions, however, are without merit. Section 20-122(a)(8) requires that permittees secure employee permits for each person employed or engaged as an independent contractor in the operation of or entertainment at a sexually-oriented business. Employees and independent contractors are subject to the same civil disability provisions as operators, and an employee's permit may be revoked or suspended for the same misconduct that mandates the revocation or suspension of an operator's permit.

The employee permit requirement is narrowly tailored to impose a burden that is no greater than essential to serve the governmental interest of combatting crime and ensuring public health. The employees of a business are most often charged with

the day-to-day operation of that business; there is no reason to assume that sexually-oriented businesses are any different from other businesses in this regard. It would be illogical to impose one set of standards on the operator of a sexually-oriented business without holding that operator's employees to the same standards of conduct.[27] The ordinance's requirement that employees have permits serves the same purpose and is constitutionally valid for the same reasons as the ordinance's general permit requirement, which the court has already addressed.[28]

g. *Inspection provisions.* Plaintiffs also challenge the ordinance provision which permits inspection of a sexually-oriented business any time that the premises is either occupied or open for business. They argue that such a broad inspection requirement is violative of the Fourth Amendment's prohibition of unreasonable searches and seizures. Plaintiff's Fourth Amendment argument is without merit. Pursuant to the

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27. The record indicates that sexually oriented businesses employ persons who characterize themselves as "independent contractors," most often dancers at "adult cabarets." Plaintiffs contend that the permit requirement is overbroad with respect to such independent contractors. Section 20-122(a) (8), however, specifically provides that a permit is required only of independent contractors engaged "in the operation of or entertainment at a sexually oriented business." The scope of this provision is no more broad than necessary to include "independent contractors" who perform the same tasks and have the same responsibilities as regular employees of a sexually oriented business.

28. It should be noted that other courts have upheld ordinances imposing *respondeat superior* on owners of sexually-oriented businesses for the conduct of their employees. *See. e.g., Ellwest Stereo Theater, Inc. v. Boner,* 718 F.Supp. 1553, 1577-78 (M.D. Tenn. 1989); *Broadway Books, Inc. v. Roberts,* 642 F. Supp. 486, 494 (E.D. Tenn 1986). Ordinance 4013 stops short of holding employers responsible for their employees' conduct; it simply hold employees to the same standards of conduct applicable to the operators of sexually-oriented businesses.

"administrative search doctrine," authorities may conduct searches, even without a warrant, to enforce regulatory standards in pervasively regulated businesses. *See Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978); *United States v. Biswell*, 406 U.S. 311, 316 (1972).

This court agrees with the holding of the Fifth Circuit in *FW/PBS v. City of Dallas*, 837 F.2d 1298, 1306 (5th Cir. 1988), *aff'd in part and rev'd in part*, 493 U.S. 215 (1990), that "sexually oriented businesses face a degree of regulation that renders the inspection provision presumptively reasonable." The record reveals that the inspection of the premises of sexually-oriented businesses is both necessary and no more burdensome than required to ensure that goals of the ordinance — countering the adverse secondary effects of these businesses on the surrounding community and insuring public health — are fulfilled.[29]

h. *License Fee Requirement.* Plaintiffs next challenge the ordinance's $5000 annual permit fee as excessive, a revenue measure, and an impermissible restriction on their first amendment rights. Each operator-plaintiff has standing to challenge the fee provision.

It is well-established that a state may not impose a charge

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29. Unlike the Dallas ordinance struck down in *FW/PBS*, Ordinance 4013 does not mandate inspections by any of the named entities at any time before or after a permit has been issued. Ordinance 4013 simply requires that an applicant or permittee permit such inspections "at any time [the business] is occupied or open for business." § 20-122(d). Both § 1.06 of the Standard Fire Prevention Code and § 103.1 of the Standard Building Code provide authorities with a right of entry for inspection and code enforcement purposes. Each of these codes has been adopted as an ordinance by the city of Memphis. Ordinance 4013's inspection requirement is neither unduly burdensome nor a violation of the Fourth Amendment.

upon the exercise of a constitutional right. *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105, 114 (1943); *Broadway Books, Inc. v. Roberts*, 642 F.Supp. 486 (E.D. Tenn. 1986). The rationale for the rule is that "the power to impose a license tax on the exercise of . . . [First Amendment] freedoms is as potent as the power of censorship." *Murdock*, 319 U.S. at 113. *See also Ellwest Stereo Theater, Inc. v. Boner*, 718 F.Supp. 1553, 1575 (M.D. Tenn. 1989). A license fee is not unconstitutional, however, provided that it is imposed only as a regulatory measure to defray the cost of investigating the license applicant and policing the regulated activity. *See e.g., City of Minot v. Central Avenue News*, 308 N.W.2d 851 (N.D. 1981).

The licensing authority bears the burden of proving that the license fee is necessary to cover the reasonable costs of the administering that scheme. *Ellwest*, 718 F. Supp. at 1574; *Bayside Enterprises, Inc. v. Carson*, 450 F.Supp. 696 (M.D. Fla. 1978). Where speech protected by the first amendment is singled out by licensing and permit fee requirements, the licensing authority must convincingly justify these requirements because "differential treatment . . . suggests that the goal of the regulation is not unrelated to suppression of expression and such a goal is presumptively unconstitutional." *Minneapolis Star v. Minnesota Comm'n of Revenue*, 460 U.S. 575, 585 (1983). *See also Ellwest*, 718 F.Supp. at 1574.

The ordinance's $5000 per year permit fee substantially exceeds any other adult or sexually-oriented business license fee of which the court is aware.[30] Arguably, it is so excessive in light

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30. The Dallas ordinance on which Ordinance 4013 is based provides for a operator's license fee of $500. *See Dumas v. City of Dallas*, 648 F. Supp. at 1083. The Nashville ordinance regulating adult-oriented businesses that was challenged in *Ellwest* also set a $500 license fee. *See Ellwest*, 718 F. Supp. at 1574. A Tennessee

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of other cities' fees imposed on sexually-oriented businesses that it "begins to resemble a penalty." *Minneapolis Star,* 460 U.S. at 1375.

The evidence in the record fails to support the city's contention that the $5000 fee represents the costs of enforcing or of administering the ordinance. Unlike the $500 license fee which was upheld in *Broadway Books*, 642 F.Supp. 486, 493 (E.D. Tenn. 1986), the fee here has not been shown to be as minimal as necessary to meet the costs to the city of administering and enforcing the permit scheme. It is also imposed without reference to the size or the classification of the sexually-oriented business involved.

The city attempts to justify the fee by filing a document titled "Cost To Regulate the Adult Sex-oriented Businesses By the Vice Squad of Memphis Police Department," which includes the annual costs of vehicles, equipment, overtime and court time, and the salaries of police officers. *See* Record Filed by Defendant, September 15, 1992. The city also provides, with little explanation, figures from the Police Division "associated with the Sexually Oriented Business Activity," including data on personnel costs, material and supplies, and capital costs. *Id.* Finally, the city provides a memorandum from Jere N. Wilson, identified as "permit co-ordinator," to Lt. Robert Jones,

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law purporting to facilitate the local regulation of sexually oriented businesses provided for a $1000 fee, but the entire statute was declared unconstitutional by Judge Leon Jordan of the Eastern District of Tennessee. *See Brothers Three Enterprises, Inc. v. Knox County,* Memorandum Opinion, No. 3-89-35, at 41-44. *see also Genusa v. City of Peoria*, 619 F.2d at 1213 ($100 fee); *Bayside Enterprises v. Carson*, 470 F. Supp. 1140, 1148-49 (M.D. Fla. 1979) ($400); *Borrago v. City of Louisville*, 456 F. Supp. 30 (W.D. Ky. 1978) ($250).

identified as "Commander, MPD Permits," explaining that the ordinance's permit scheme will require three additional clerks and a small amount of additional office equipment. *Id.* These last two documents contain an estimate of protected initial revenue from permit fees of $265,000.

The record is simply too incomplete to provide justification for the amount of the fee. The material in the record before this court were presented to the Memphis City Council for its consideration in enacting the ordinance and their admission here is supported simply by an affidavit stating they were presented to the council. There is nothing in the record explaining the method of preparation of these figures or, in most cases, what the figures represent. For example, it is unclear whether the vice squad operation costs are the total vice squad costs annually or whether these cost figures have in some unspecified way been allocated to vice squad activity related to the businesses regulated by the ordinance.

This evidence does not justify the amount of the fee. There is little basis for calculating the cost of enforcement of this ordinance, as defendants would have it, by totaling the cost of operation of the vice squad or some other police division and dividing that figure by the number of sexually-oriented businesses in the city. The vice squad deals with a much wider variety of problems than those specifically present at the various kinds of sexually-oriented businesses regulated by this ordinance.[31] While the Record introduced by the city does tend to show that the costs associated with policing the activities in and

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31. In fact, the reports introduced by the city of Memphis in the Record address topless club enforcement and the number of prostitution arrests near adult motels. The city has offered little if any data related to the costs of enforcement as to the other sexually-oriented businesses subject to the ordinance.

around sexually-oriented businesses are substantial, there is relatively little evidence to show what the costs of administering this permit scheme will be. On the evidence before it, the court cannot conclude that the high permit fee is related to the legitimate costs of enforcement.[32]

Moreover, there is evidence in the record that the fee is directly related to the desire of at least some members of the Memphis City Council to force sexually-oriented businesses out of business. From the records of the city council debates introduced by the plaintiffs, the $5000 amount that was finally selected as a fee was not arrived at after any careful investigation or calculation of the costs of enforcement, but was instead chosen because certain council members believed a high fee would make the operation of such businesses cost-prohibitive.[33]

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32. Plaintiffs cite the Supreme Court's recent decision in *Forsyth County, Georgia v. Nationalist Movement*, 112 S.Ct. 2395 (1992), in support of their argument that the permit fee is unconstitutional. In *Forsyth County*, the Court struck down a county assembly and parade ordinance that allowed a county administrator to vary its parade permit fee to reflect the costs of "maintaining order." The court held that such a variable fee provision was facially invalid because it lacked narrowly drawn and definite standards to guide the licensor and becauae it required the licensor to examine the content of the message conveyed in order to estimate the costs of police services. Ordinance 4013's $5,000 permit fee is not invalid, at least under *Forsyth County*. The Memphis ordinance imposes a single, objective fee on all regulated businesses and does not permit the licensor to vary the fee based on content. It vests no discretion with regard to the fee and does not require the licensor to "pass[] judgment on the content of any protected speech." *FW/PBS*, 493 U.S. at 229.

33. The record of the Memphis City Council meeting of October 2, 1990, Agenda Item No. 11, indicates that a fee of $1000 was originally proposed but that certain members of the Council urged the Council as a whole to increase the fee to as high an amount as they thought the court would uphold in order to increase the

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It is, however, "a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968). Accordingly, this court will not attribute the motives of certain members of the Council to the Council as a whole.

There is simply not enough evidence in the record for the court to determine that there is no genuine issue of material fact. Summary judgment is therefore denied on both parties' motions on this issue.

4. *Conclusion.* Ordinance 4013 is not an unconstitutional prior restraint and meets the four-part test for time, place and manner restrictions set forth in *United States v. O'Brien*. It is therefore constitutional, except for the fee provision. Because a genuine issue of fact remains as to the constitutionality of the permit fee, the court's preliminary injunction shall remain in effect pending trial on that issue. Summary judgment is granted in favor of the defendants on the balance of the ordinance. Trial on the fee issue is set for June 30 at 9:30 a.m.

IT IS SO ORDERED.

s/ Julia Smith Gibbons
JULIA SMITH GIBBONS
UNITED STATES DISTRICT JUDGE
May 14, 1993
DATE

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possibility that at least some sexually-oriented businesses would close. *See* Record of Memphis City Council Meeting, October 2, 1990, Agenda Item No. 11, at 15, 21-23.

APPENDIX D — ORDINANCE NO. 4013

ORDINANCE
AMENDING ORDINANCE NO. 3988

ORDINANCE NO. 4013

ORDINANCE TO AMEND CHAPTER 20, CODE OF ORDINANCES, CITY OF MEMPHIS, TO ESTABLISH A NEW DIVISION 3 UNDER ARTICLE IV, CONCERNING SEXUALLY ORIENTED BUSINESSES

WHEREAS, the Charter of the City of Memphis provides that the local government shall have power over all affairs in the City in which the peace, safety, or general welfare of the inhabitants is interested; and

WHEREAS, the Council of the City of Memphis finds that there exist serious and adverse secondary effects of crime and deterioration in the appearance, business vitality, and property values of areas into which sexually oriented businesses have moved, and an increasing concentration of such businesses thereby aggravating said problem, and that the citizens of the City desire that the Council take action appropriate to remedy these situations, and the Council finds that regulation of such businesses is, therefore, appropriate; and

WHEREAS, the Council finds that unregulated operation of the businesses described hereunder begets unsanitary conditions and unhealthy and unwholesome activities at such businesses, and in order to safeguard the health and well-being of the citizenry, to improve sanitary conditions in certain public places, and to provide for an improvement in the prevention of communicable diseases; and

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WHEREAS, the Council members find the continuing problems, in the City's other licensing and permit systems, or persons who may be unqualified to obtain a permit using the services of qualified persons to obtain permit while in actuality retaining full or actual control of businesses having the permit, and of persons obtaining permits under false pretenses for such persons, and of other schemes of hiding ownership of sexually-oriented businesses which produce evasion of the provisions of law and of lawful Orders of judges of the City and state, as evidenced in several court cases in the past as well as presently pending cases in the Shelby County Chancery, Circuit and Criminal courts; and in order to prevent the continuation of such deception and to insure that the operation of businesses regulated hereby be done only by persons qualified hereby; and

WHEREAS, in order to provide the funds necessary to register and regulate the businesses described herein; and

WHEREAS, the Council members have had the opportunity to read and are aware of the 1977 "Study of the Effects of the Concentration of Adult Entertainment Establishments in the City of Los Angeles," and concur in its findings as to the effects in the City of Memphis; and

WHEREAS, the Council members have had the opportunity to read and are aware of two reports prepared by the City of Memphis Police Services Division Vice Squad, 1989 and 1990 Topless Club Enforcement, and a June 18, 1990 letter concerning hourly-rate motel, regarding the unusually large numbers of criminal arrests made in and around sexually oriented businesses in the City of Memphis; and

WHEREAS, the Council members are aware of an

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Ordinance of the City of Dallas, Texas, Dallas City Code chapter 41A, and do premise this Ordinance on the portions of that Ordinance upheld by the United States Supreme Court in the case of *FW/PBS, Inc., v. City of Dallas*, reported at Volume 110 of the Supreme Court Reporter, page 596 *et seq.* (1990), and on amendments made in accordance with and pursuant to that decision; and

WHEREAS, the Public Safety Committee members have met with the Law Enforcement Committee members of the Shelby County Commission, and the Council has discovered that the problems noted hereinabove exist not only in the City but in the entire County as well, and that passage of identical or nearly-identical ordinances by the Council and the County Commission is, therefore, appropriate;

NOW, THEREFORE,

SECTION 1. BE IT ORDAINED BY THE COUNCIL OF THE CITY OF MEMPHIS, that Chapter 20, Code of Ordinances, City of Memphis, be and the same is hereby amended as follows:

1. By deleting the present Division 3, section 20-121 through through 20-135 inclusive, in its entirety, and substituting in lieu thereof a new Division 3, sections 20-121 through 20-135 inclusive, to read as follows:

"DIVISION 3. SEXUALLY ORIENTED BUSINESSES

SEC. 20-121(a)	Purpose and intent.
SEC. 20-121(b)	Definitions.
SEC. 20-121(c)	Classification.
SEC. 20-122(a)	Permit required.

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SEC. 20-122(b)	Issuance of permit.
SEC. 20-122(c)	Fees.
SEC. 20-122(d)	Inspection.
SEC. 20-122(e)	Expiration of permit.
SEC. 20-123(a)	Suspension.
SEC. 20-123(b)	Revocation.
SEC. 20-124	Hearings and appeals.
SEC. 20-125	Transfer of permit.
SEC. 20-126	Location of sexually oriented businesses.
SEC. 20-127	Exemption from location restrictions.
SEC. 20-128	Additional regulations for escort agencies.
SEC. 20-129	Additional regulations for nude model studios.
SEC. 20-130	Additional regulations for adult theaters and adult motion picture theaters.
SEC. 20-131	Additional regulations for adult motels.
SEC. 20-132	Regulations pertaining to exhibition of sexually explicit films or videos.
SEC. 20-133	Display of sexually explicit material to minors.
SEC. 20-134	Enforcement.
SEC. 20-135	Injunction.

SEC. 20-121(a). PURPOSE AND INTENT

It is the purpose of this chapter to regulate sexually oriented business to promote the health, safety, morals, and general

welfare of the citizens of the city and to establish reasonable and uniform regulations to prevent the continued concentrations of sexually oriented businesses within the city. The provisions of this chapter have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including sexually oriented materials. Similarly, it is neither the intent nor effect of this chapter to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market.

(b) DEFINITIONS

(1) ADULT ARCADE means any place to which the public is permitted or invited wherein coin-operated or slug-operated or electronically, electrically, or mechanically controlled still or motion picture machines, projectors, or other image-producing devices are maintained to show images to five or fewer persons per machine at any one time, and where the images so displayed are distinguished or characterized by the depicting or describing of "specified sexual activities or specified anatomical areas."

(2) ADULT BOOKSTORE or ADULT VIDEO STORE means a commercial establishment which as one of its principal business purposes offers for sale or rental for any form of consideration any one or more of the following:

(A) books, magazines, periodicals, or other printed matter, or photograph, film, motion pictures, video cassettes or video reproductions, slides, or other visual representations, which depict or describe "specified sexual activities" or "specified anatomical areas"; or

(B) instruments, devices, or paraphernalia which are designed for use in connection with "specified sexual activities."

(3) ADULT CABARET means a nightclub, bar, restaurant or similar commercial establishment which regularly features:

(A) persons who appear in a state of nudity; or

(B) live performances which are characterized by the exposure of "specified anatomical areas" or "by specified sexual activities"; or

(C) films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas."

(4) ADULT MOTEL means a hotel, motel or similar commercial establishment which:

(A) offers accommodations to the public for any form of consideration; provide patrons with closed-circuit television transmissions, films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas"; and may have a sign visible from the public right of way which advertises the availability of this adult type of photographic reproductions. This definition shall not include "R-rated" film so defined by the Motion Picture Association; or

(B) offers a sleeping room for rent more than two times in a period of ten hours; or

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(C) allows a tenant or occupant of a sleeping room to subrent the room for a period of time that is less than 10 hours; or

(D) offers or allows a discount or refund which is less than half the normal daily rate

(5) ADULT MOTION PICTURE THEATER means a commercial establishment where, for any form of consideration, films, motion pictures, video cassettes, slides, or similar photographic reproductions are regularly shown which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas." This definition shall not include "R-rated" films so defined by the Motion Picture Association.

(6) ADULT TELECOMMUNICATIONS BUSINESS means a commercial establishment where, by means of telephone, any communication characterized by the description of "specified anatomical areas" or "specified sexual activities" is made for commercial purposes to any person, regardless of whether the maker of such communication placed the call. Adult telecommunication businesses are exempt from the permit requirements of this chapter but shall comply with its locational requirements.

(7) ADULT THEATER means a theater, concert hall, auditorium, or similar commercial establishment which regularly features persons who appear in a state of nudity or semi-nude, or live performances which are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities."

(8) DIRECTOR OF POLICE SERVICES means the director of police services of the City of Memphis or his designated agent.

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(9) ESCORT means a person who, for consideration, agrees or offers to act as a companion, guide, or date for another person, or who agrees or offers to privately model lingerie or to privately perform a striptease for another person.

(10) ESCORT AGENCY means a person or business association who furnishes, offers to furnish, or advertises to furnish escorts as one of its primary business purposes, for a fee, tip, or other consideration.

(11) ESTABLISHMENT means and includes any of the following:

(A) the opening or commencement of any sexually oriented business as a new business;

(B) the conversion of an existing business, whether or not a sexually oriented business, to any sexually oriented business;

(C) the addition of any sexually oriented business to any other existing sexually oriented business; or

(D) the relocation of any sexually oriented business

(12) LANDMARK DISTRICT mean a geographically definable area with a concentration of landmark buildings, objects or sites.

(13) NUDE MODEL STUDIO means any place where a person who appears in a state of nudity or display {specified anatomical areas" is provided to be observed, sketched, drawn, painted, sculptured, photographed, or similarly depicted by other person who pay money or any form of consideration .

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(14) NUDITY or a STATE OF NUDITY means:

(A) the appearance of a human bare buttock, anus, male genitals, female genitals, or female breast; or

(B) a state of dress which fails to cover opaquely a human buttock, anus, male genitals, female genitals, or areola of the female breast.

(15) OPERATES OR CAUSES TO BE OPERATED means to cause to function or to put or keep in operation. A person may be found to be operating or causing to be operating a sexually oriented business whether or not that person is an owner, part-time owner, or permittee of the business.

(16) PERMITTEE means a person in whose name a permit to operate a sexually oriented business has been issued, as well a the individual listed as an applicant on the application for a permit. "Permittee" shall include an operator of an adult telecommunications business only for purpose of Section 20-122(d).

(17) PERSON means an individual, proprietorship, partnership, corporation, association, or other legal entity.

(18) RESIDENTIAL DISTRICT means a district whose designation begins with the letter "R" or "AG" according to the Memphis and Shelby County Zoning Ordinances.

(19) RESIDENTIAL USE means any building or portion of a building used as a dwelling unit.

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(20) SEMI-NUDE means a state of dress in which clothing covers no more than the genitals, pubic region, and areola of the female breast, as well as portions of the body covered by supporting straps or devices.

(21) SEXUAL ENCOUNTER CENTER means a business or commercial enterprise that, as one of its primary business purposes, offers for any form of consideration:

(A) physical contact in the form of wrestling or tumbling between persons of the opposite sex; or

(B) activities between male and female persons and/or persons of the same sex when one or more of the persons is in a state of nudity or semi-nude.

(22) SEXUALLY ORIENTED BUSINESS means an adult arcade, adult bookstore or adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, escort agency, nude model studio, or sexual encounter center or, for the purposes noted in Section 20-121(c)(6), adult telecommunications business.

(23) SPECIFIED ANATOMICAL AREAS means:

(A) Less than completely and opaquely covered:

I. Human genitals, pubic regions,

II. Buttock and

III. Female breast below a point immediately above the top of the areola and

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(B) Human male genitals in a discernible turgid state, even if completely and opaquely covered.

(C) Use of artificial devices or inanimate objects to depict any of the items described above.

(24) SPECIFIED SEXUAL ACTIVITIES means:

(A) Human genitals in a state of sexual stimulation or arousal;

(B) Acts of human masturbation, sexual intercourse or sodomy;

(C) Fondling or other erotic touching of human genitals, pubic region, buttock or female breast;

(D) Acts of bestiality;

(E) Use of artificial devices or, inanimate object to depict any of the activities described in this section.

(25) SUBSTANTIAL ENLARGEMENT of a sexually oriented business means the increase in floor area occupied by the business by more than 25 percent, as the floor area exists on July 9, 1990.

(26) TRANSFER OF OWNERSHIP OR CONTROL of a sexually oriented business means and includes any of the following:

(A) the sale, lease or sublease of the business;

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(B) the transfer of securities which constitute a controlling interest in the business, whether by sale, exchange, or similar means; or

(C) the establishment of a trust, gift, or other similar legal device which transfers the ownership or control of the business, except for transfer by bequest or other operation of law upon the death of the person possessing the ownership or control.

(c) CLASSIFICATION

Sexually oriented businesses are classified a follows:

(1) adult arcades;
(2) adult bookstores or adult video stores;
(3) adult cabarets;
(4) adult motels;
(5) adult motion picture theaters;
(6) adult telecommunications businesses, but only for purpose of Sections 20-122(d), 20-126, 20-127, 20-134, and 20-135;
(7) adult theaters;
(8) escort agencies;
(9) nude model studios; and
(10) sexual encounter centers.

SEC. 20-122(a). PERMIT REQUIRED

(1) A person commits an offense he operates a sexually oriented business without a valid permit, issued by the city or county for the particular type of business.

(2) For purposes of this chapter, the issuance, suspension, and revocation of a permit for a sexually oriented business located within the City of Memphis shall be handled by the director of police services.

(3) An application for a permit must be made on a form provided by the director of police services. The application must be accompanied by a sketch or diagram showing the configuration of the premises, including a statement of total floor space occupied by the business. The sketch or diagram need not be professionally prepared but must be drawn to a designated scale or drawn with marked dimensions of the interior of the premises to an accuracy of plus or minus six inches Applicants who must comply with Section 20-132 of this chapter shall submit a diagram meeting the requirements of Section 20-132.

(4) The applicant must be qualified according to the provisions of this chapter.

(5) If a person who wishes to operate a sexually oriented business is an individual, he must sign the application for a permit as applicant. If a person who wishes to operate a sexually oriented business is other than an individual, each individual who has any interest in the business must sign the application for a permit as applicant. Each applicant must be qualified under subsection (b) hereof and each applicant shall be considered a permittee if a permit is granted.

(6) The fact that a person possesses a valid theater permit, dance hall permit, or public house of amusement permit does not exempt him from the requirement of obtaining a sexually oriented business permit. A person who operates a sexually oriented business and possesses a theater permit, public house of

amusement permit or dance hall permit shall comply with the requirements and provisions of this chapter, as well as the requirements and provisions of all other Memphis and Shelby County building, fire, health and other permit codes.

(7) A permit may be issued only in the name of a natural person.

(8) Every permittee shall, before employing any person or using the services of an independent contractor in the operation of or entertainment at a sexually oriented business, secure from the director of police services an employee's permit authorizing such person to serve as an employee or independent contractor in the place of business of the sexually oriented business permittee. It is made the duty of the sexually oriented business permittee to ensure that each person so employed in permittee's place of business has an employee's permit as above required, which permit must be upon the sexually oriented business premises at all times subject to inspection by the director of police services, or his duly authorized agents.

No employee's permit may be issued for any person who has been convicted of an offense listed in section 20-122(b)(1)(H)(i) for which the time period required in section 20-122(b)(1)(H)(ii) has not elapsed.

An employee's permit issued pursuant to the provisions of this section shall be valid for a three-year period and shall be subject to suspension or revocation for breaches described in sections 20-123(a) and 20-123(b) of this chapter. An employee's permit shall be revoked upon the employee's or independent contractor's conviction of an offense listed in section 20-122(b)(1)(H)(i).

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Applications for renewal shall be made in the same manner as applications for original permits upon forms to be prescribed by the director of police services. Such permit shall not be transferable and must be surrendered to the director of police services within five days from the date the holder thereof ceases to work for or at a sexually oriented business, and it shall be the duty of the sexually oriented business permittee to notify the director of police services within five days of the termination of the employment for which such permit was issued.

(b) ISSUANCE OF PERMIT

(1) The director of police services shall approve the issuance of a permit to an applicant within 30 days after receipt of an application unless the director of police services finds one or more of the following to be true:

(A) An applicant is under 18 years of age.

(B) An applicant is overdue in payment to the city of taxes, fees, fines, or penalties assessed against or imposed upon the applicant in relation to a sexually oriented business.

(C) An applicant has failed to provide information reasonably necessary for issuance of the permit or has falsely answered a question or request for information on the application form.

(D) An applicant has been convicted of a violation of a provision of this article, other than the offense of operating a sexually oriented business without a permit, within two years immediately preceding the application. The fact that a conviction is being appealed shall have no effect.

(E) The permit fee required by this chapter has not been paid.

(F) An applicant has been employed in a sexually oriented business in a managerial capacity within the preceding 12 months and has demonstrated an inability to operate or manage a sexually oriented business premises in a peaceful and law-abiding manner, thus necessitating action by law enforcement officers.

(G) An applicant or the proposed establishment is in violation of or is not in compliance with Sections 20-122(d), 20-124, 20-125, 20-126, 20-127, 20-128, 20-129, 20-130, 20-131, 20-132, or 20-133 of this ordinance.

(H) An applicant has been convicted of a crime.

(i) involving any of the following offenses as described in Title 39 of the Tennessee Code Annotated or juvenile laws of Tennessee, or corresponding offenses of other, including federal, jurisdictions:

(I) prostitution;

(II) promoting prostitution;

(III) the obscenity laws;

(IV) sale, loan, distribution, or exhibition to one or more minors of material which is harmful to minors;

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(V) use of minors for obscene purposes;

(VI) promotion of performances including sexual conduct by minors;

(VII) indecent exposure;

(VIII) statutory rape;

(IX) rape, aggravated rape, sexual battery, or aggravated sexual battery;

(X) incest;

(XI) criminal attempt, conspiracy, or solicitation to commit any of the foregoing offenses,

(ii) for which:

(I) less than two years have elapsed since the date of conviction or the date of release from confinement imposed for the conviction, whichever is the later date, if the conviction is of a misdemeanor offense;

(II) less than five years have elapsed since the date of conviction or the date of release from confinement for the conviction, whichever is the later date, if the conviction is of a felony offense; or

(III) less than five years have elapsed since the date of the last conviction or the date of release from confinement for the last conviction, whichever is the later date, if the convictions are of two or more misdemeanor offenses or combination of misdemeanor offenses occurring within any 24-month period.

(2) The fact that a conviction is being appealed shall have no effect on the disqualification of the applicant or applicant's spouse.

(3) An applicant who has been convicted or whose spouse has been convicted of any offense listed in subsection (b)(1)(H)(i) hereof may qualify for a sexually oriented business permit only when the time period required by subsection (b)(1)(H)(ii) hereof has elapsed.

(4) The permit, if granted, shall state on its face the name of the person or persons to whom it is granted, the expiration date, and the street address and any post office address of the sexually oriented business. The permit shall be posted in a conspicuous place at or near the entrance to the sexually oriented business so that it may be easily read at any time.

(c) FEES.

(1) The annual fee for a sexually oriented business permit is $5,000.

(2) The annual fee for a permit issued on a date other than the annual expiration date shall be prorated according to the number of days remaining until the expiration date.

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(3) The applicant for an employee's permit shall pay to the director of police services the sum of fifteen dollars therefor.

(4) Fees shall be collected by the director of police services at the time of issuance of the permit.

(d) INSPECTION.

(1) An applicant or permittee shall permit representatives of the police services division, health department, fire services division, housing and community development division and construction code enforcement division to inspect the premises of a sexually oriented business for the purpose of insuring compliance with the law, at any time it is occupied or open for business.

(2) A person who operates a sexually oriented business or his agent, employee or independent contractor, commits an offense if he refuses to permit a lawful inspection of the premises by a representative of the police services division or health department at any time it is occupied or open for business.

(e) EXPIRATION OF PERMIT.

Each permit shall expire December 31 of each year and may be renewed only by making application as provided in Section 20-122(a) of this chapter. Application for renewal should be made at least 30 days before the expiration date, and when made less than 30 days before the expiration date, the expiration of the permit will not be affected.

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SEC. 20-123(a) SUSPENSION.

The director of police services shall suspend a permit for a period not to exceed 30 days if he determines that a permittee or an employee or agent of a permittee or independent contractor employed at the licensed premises has:

(1) violated or is not in compliance with Sections 20-122(d), 20-125, 20-126, 20-128, 20-129, 20-130, 20-131, 20-132 or 20-133 of this chapter;

(2) engaged in excessive use of alcoholic beverages while on the sexually oriented business premises;

(3) refused to allow an unimpeded inspection of the sexually oriented business premises as authorized by this chapter;

(4) knowingly permitted gambling by any person on the sexually oriented business premises;

(5) demonstrated inability to operate or manage a sexually oriented business in a peaceful and law-abiding manner thus necessitating action by law enforcement officers.

(b) REVOCATION.

(1) The director of police services shall revoke a permit if a cause of suspension in subsection (a) occurs and the permit has been suspended within the preceding 12 months.

(2) The director of police services shall revoke a permit if he determines that:

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(A) a permittee gave false or misleading information in the material submitted to the director of police services during the application process;

(3) a permittee or an employee, agent, or independent contractor employed on the premises has allowed possession, use, or sale of controlled substances on the premises;

(C) a permittee or an employee, agent, or independent contractor employed on the premises has allowed prostitution on the premises;

(D) a permittee or an employee, agent, or independent contractor employed on the premises operated the sexually oriented business during a period of time when the permittee's permit was suspended;

(E) a permittee ha been convicted of an offense listed in Section 20-122(b)(H)(i) for which the time period required in Section 20-122(b)(H)(i) has not elapsed;

(F) on two or more occasions within a 12-month period, a person or persons committed an offense occurring in or on the licensed premise of a crime listed in Section 20-122(b)(H)(i) for which a conviction has been obtained, and the person or persons were employees, agents or independent contractors employed on the premises of the sexually oriented business at the time the offenses were committed;

(G) a permittee or an employee, agent, or independent contractor employed on the premises has allowed any act of sexual intercourse, sodomy, oral copulation, masturbation, or sexual contact to occur in or on the licensed premises. The term

"sexual contact" shall have the same meaning as it is defined in Section 39-13-501(6) of the Tennessee Code Annotated; or

(H) a permittee is delinquent in payment to the city for hotel occupancy taxes, ad valorem taxes, or sales taxes related to the sexually oriented business.

(3) The fact that a conviction is being appealed shall have no effect on the revocation of the permit.

(4) Subsection (b)(2)(G) hereof does not apply to adult motels as a ground for revoking the permit unless the permittee, employee, agent or independent contractor employed at the premises allowed the act of sexual intercourse, sodomy, oral copulation, masturbation, or sexual contact to occur in a public place or within public view.

(5) When the director of police services revokes a permit, the revocation shall continue five years and no sexually oriented business permit shall be issued to that permittee for five years from the date revocation became effective. If, subsequent to revocation, the director of police services finds that the basis for the revocation has been corrected or abated, a permit may be granted to the permittee if at least 90 days have elapsed since the date the revocation became effective. If the permit was revoked under subsection (b)(2)(E) hereof, an applicant may not be granted another permit until the appropriate number of year under Section 20-122(b)(H)(ii) has elapsed.

SEC. 20-124. HEARINGS AND APPEALS.

If the director of police services denies the issuance of a permit for a reason other than a violation of Section 20-126 of this

chapter, or a permittee, applicant or business desires to appeal his, her or its revocation or suspension, it shall be done in the following manner:

1. Written notice of the denial or proposed suspension or revocation shall be sent to the permittee by certified mail, return receipt requested, or have delivered by process server.

2. The appeal of the denial, revocation, or suspension must be filed with the director of police services within 10 calendar days of receipt of notice.

3. A hearing must be scheduled and held before the director of police services within 60 days, unless continued to a later date by consent of the parties.

4. When a permit is suspended or revoked, the suspension or revocation of the permit shall not occur within 60 days of receipt of notice described in subsection (1) hereof or prior to the dates of the hearing, whichever is less, unless the health officer determines there to be a health hazard or risk of disease at said location. No issuance of a new permit for that permitted, business, or location shall occur until after the date set for hearing has passed.

5. A decision of the director of police services must be made in writing to all parties within five (5) days of the conclusion of the hearing.

6. Any appeal of the decision of the director of police services shall be made by Common Law Writ of Certiorari to a court of competent jurisdiction. Said appeal must be filed within 30 calendar days after receipt of a written decision from the

director of police services or offer of delivery of such decision is made.

7. No permit shall be extended during a court appeal without a court ordered Writ of Supersedeas.

SEC. 20-125. TRANSFER OF PERMIT.

A permittee shall not transfer his permit to another, nor shall a permittee operate a sexually oriented business under the authority of a permit at any place other than the street address designated in the application.

SEC. 20-126. LOCATION OF SEXUALLY ORIENTED BUSINESSES.

(a) A person commits an offense if he operates or causes to be operated a sexually oriented business within 1,500 feet of:

(1) a duly organized and recognized church;

(2) a public or private elementary or secondary school;

(3) a boundary of a residential or landmark district as defined in this Code;

(4) a public park; or

(5) the property line of a lot devoted to a residential use as defined in this Code.

(b) A person commits an offense if he causes or permits the

operation, establishment, substantial enlargement, or transfer of ownership or control of a sexually oriented business within 1,500 feet of another sexually oriented business.

(c) A person commits an offense if he causes or permits the operation, establishment, or maintenance of more than one sexually oriented business in the same building, structure, or portion thereof, or the increase of floor area of any sexually oriented business in any building, structure, or portion thereof containing another sexually oriented business.

(d) For the purpose of subsection (a), measurement shall be made in a straight line, without regard to intervening structures or objects, from the nearest portion of the building or structure used as a part of the premises where a sexually oriented business is conducted, to the nearest property line of the premises of a church or public or private elementary or secondary school, or to the nearest boundary of an affected public park, residential district, or local historic district.

(e) For purpose of subsection (b) of this section, the distance between any two sexually oriented businesses shall be measured in a straight line, without regard to intervening structures or objects, from the closest exterior wall of the structure in which each business is located.

(f) Any sexually oriented business lawfully operating on July 1, 1990, that is in violation of subsection (a), (b), or (c) of this section shall be deemed a nonconforming use. The nonconforming use will be permitted to continue for a period not to exceed one year, unless sooner terminated for any reason or voluntarily discontinued. In the event of termination of such a sexually oriented business, anyone applying for a reopening or

for another sexually oriented business establishment at the premises, will be considered a new applicant. Such nonconforming uses shall not be increased, enlarged, extended or altered except that the use may be changed to a conforming use. If two or more sexually oriented businesses are within 1,500 feet of one another and otherwise in a permissible location, the sexually oriented business which was first established and continually operating at a particular location is the conforming use and the later-established business(es) is nonconforming.

(g) A sexually oriented business lawfully operating as a conforming use is not rendered a nonconforming use by the location, subsequent to the grant or renewal of the sexually oriented business permit, of a church, public or private elementary or secondary school, public park, residential district, or residential lot within 1,500 feet of the sexually oriented business. This provision applies only to the renewal of a valid permit, and does not apply when an application for a permit is submitted after a permit has expired or has been revoked.

(h) Nothing in this section shall prohibit the City of Memphis from seeking and obtaining injunctive relief, or the continuation of litigation for injunctive relief pending at the time this ordinance becomes effective, against any sexually oriented business which has opened or may open, from March 31, 1987, to the time this ordinance becomes effective, within 1,000 feet of a duly organized, recognized church, public or private elementary or secondary school, boundary of a residential district as defined by the Memphis City Code, public park adjacent to a residential district as defined by the Memphis City Code, or any other sexually oriented business. For purposes of this subsection only, the term "sexually oriented business" shall be limited to and retain the definitions set forth in the predecessor ordinance of the

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City of Memphis, Ordinance No 3647, dated March 31, 1987, City of Memphis Code section 20-121, *et seq.*, especially 20-122 (Supp. No. 5). This Ordinance is an amended recreation of, and not an abandonment of, said predecessor ordinance.

SEC. 20-127. EXEMPTION FROM LOCATION RESTRICTIONS.

(a) If the director of police services denies the issuance of a permit to an applicant because the location of the sexually oriented business establishment is in violation of Section 20-126 of this ordinance, then the applicant may, not later than 10 calendar days after receiving notice of the denial, file with the comptroller a written request for an exemption from the locational restrictions of Section 20-126.

(b) If the written request is filed with the comptroller within the 10-day limit, the City Council shall consider the request. The comptroller shall set a date for the hearing within 60 days from the date the written request is received, and shall give notice to the public of such hearing according to the provisions of Tennessee Code Annotated Section 8-44-103.

(c) The City Council shall hear and consider evidence offered by any interested person.

(d) The City Council may, in its discretion, grant an exemption from the locational restrictions of Section 20-126 if it makes the following findings:

(1) that the location of the proposed or existing sexually oriented business will not have a detrimental effect on nearby properties or be contrary to the public welfare;

(2) that the granting of the exemption will not violate the spirit and intent of this chapter of the code;

(3) that the location of the proposed or existing sexually oriented business will not downgrade the property values or quality of life in the adjacent areas or encourage the development of urban blight;

(4) that the location of an additional sexually oriented business or the continued location of an existing sexually oriented business in the area will not be contrary to any program of neighborhood conservation nor will it interfere with any efforts of urban renewal or restoration; and

(5) that all other applicable provisions of this chapter will be observed.

(e) The City Council shall grant or deny the exemption by a majority vote. The vote shall be decided on the basis of a preponderance of the evidence. The decision of the City Council is final. Appeal shall lie by common law Writ of Certiorari to a court of competent jurisdiction. Such an appeal must be made within thirty (30) days of the City Council vote.

(f) If the City Council grants the exemption, the exemption is valid for one year from the date of the City Council's action. Upon the expiration of an exemption, the sexually oriented business is in violation of the locational restrictions of Section 20-126 until the applicant applies for and receives another exemption.

(g) If the City Council denies the exemption, the applicant may not re-apply for an exemption until at least 12 months have elapsed since the date of the City Council's action.

(h) The grant of an exemption does not exempt the applicant from any other provisions of this chapter other than the locational restrictions of Section 20-126.

SEC. 20-128. ADDITIONAL REGULATIONS FOR ESCORT AGENCIES.

(a) An escort agency permittee shall not employ, use or allow the services of any person under the age of 18 years in the operation of such establishment.

(b) A person commits an offense if he acts as an escort or agrees to act as an escort for any person under the age of 18 years.

SEC. 20-129. ADDITIONAL REGULATIONS FOR NUDE MODEL STUDIOS.

(a) A nude model studio shall not employ, use or allow the services of any person under the age of 18 years in the operation of such establishment.

(b) A person under the age of 18 years commits an offense if he appears in a state of nudity in or on the premises of a nude model studio. It is a defense to prosecution under this subsection if the person under 18 years was in a restroom not open to public view or persons of the opposite sex.

(c) A person commit an offense if he appears in a state of nudity or knowingly allows another to appear in a state of nudity in an area of a nude model studio premises which can be viewed from the public right of way.

(d) There shall be no bed, sofa, or mattress in any room on

the premises of a nude model studio except that a sofa may be placed in a reception room open to the public.

SEC. 20-130. ADDITIONAL REGULATIONS FOR ADULT THEATERS AND ADULT MOTION PICTURE THEATERS.

(a) The requirement and provisions of other sections of this code remain applicable to adult theaters and adult motion picture theaters.

(b) A person commits an offense if he knowingly allows a person under the age of 18 years to appear in a state of nudity in or on the premises of an adult theater or adult motion picture theater.

(c) A person under the age of 18 years commits an offense if he knowingly appears in a state of nudity in or on the premises of an adult theater or adult motion picture theater.

(d) It is a defense to prosecution under subsections (b) and (c) of this section if the person under 18 years was in a restroom not open to public view or person of the opposite sex.

SEC. 20-131. ADDITIONAL REGULATIONS FOR ADULT MOTELS.

Evidence that a sleeping room in a hotel, motel, or similar commercial establishment has been rented and vacated two or more times in a period of time that is less than 10 hours creates a rebuttable presumption that the establishment is an adult motel as that term is defined in this chapter.

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SEC. 20-132. REGULATIONS PERTAINING TO EXHIBITION OF SEXUALLY EXPLICIT FILMS OR VIDEOS.

(a) A person who operates or causes to be operated a sexually oriented business, other than an adult motel, which exhibits on the premises in a viewing room of less than 150 square feet of floor space, a film, video cassette, or other video reproduction which depicts specified sexual activities or specified anatomical areas, shall comply with the following requirements:

(1) Upon application for a sexually oriented business permit, the application shall be accompanied by a diagram of the premises showing a plan thereof specifying the location of one or more manager's stations and the location of all overhead lighting fixtures and designating any portion of the premises in which patrons will not be permitted. A manager's station may not exceed 32 square feet of floor area. The diagram shall also designate the place at which the permit will be conspicuously posted, if granted. A professionally prepared diagram in the nature of an engineer's or architect's blueprint shall not be required; however, each diagram should be oriented to the north or to some designated street or object and should be drawn to a designated scale or with marked dimensions sufficient to how the various internal dimensions of all areas of the interior of the premises to an accuracy of plus or minus six inches. The director of police services may waive the foregoing diagram for renewal applications if the applicant adopts a diagram that was previously submitted and certifies that the configuration of the premises has not been altered since it was prepared.

(2) The application shall be sworn to be true and by the applicant.

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(3) No alteration in the configuration or location of a manager's station may be made without the prior approval of the director of police services or his designee.

(4) It is the duty of the owners and operator of the premises to ensure that at least one employee is on duty and situated in each manager's station at all times that any patron is present inside the premises.

(5) The interior of the premises shall be configured in such a manner that there is an unobstructed view from a manager's station of every area of the premises to which any patron is permitted access for any purpose excluding restrooms. Restrooms may not contain video reproduction equipment. If the premises has two or more manager's stations designated, then the interior of the premises shall be configured in such a manner that there is an unobstructed view of each area of the premises to which any patron is permitted access for any purpose from at least one of the manager's stations. The view required in this subsection must be by direct sight from the manager's station.

(6) It shall be the duty of the owners and operators, and it shall also be the duty of any agents, employees and independent contractors employed at the premises present in the premises to ensure that the view area specified in subsection (5) remains unobstructed by any doors, walls, merchandise, display racks or other materials at all times that any patron is present in the premises and to ensure that no patron is permitted access to any area of the premises which has been designated as an area in which patrons will not be permitted in the application filed pursuant to subsection (1) of this section.

(7) The premises shall be equipped with overhead

lighting fixtures of sufficient intensity to illuminate every place to which patrons are permitted access at an illumination of not less than one (1.0) footcandle as measured at the floor level.

(8) It shall be the duty of the owners and operators and it shall also be the duty of any agents and employees present in the premises to ensure that the illumination described above is maintained at all times that any patron is present in the premises.

(b) A person having a duty under subsections (1) through (8) of subsection (a) above commits an offense if he fails to fulfill that duty.

SEC. 20-133. DISPLAY OF SEXUALLY EXPLICIT MATERIAL TO MINORS.

(a) A person commits an offense if, in a business establishment open to persons under the age of 18 years he displays a book, pamphlet, newspaper, magazine, film or video cassette, the cover of which depicts, in a manner calculated to arouse sexual lust or passion for commercial gain or to exploit sexual lust or perversion for commercial gain, any of the following:

(1) human sexual intercourse, masturbation, or sodomy;

(2) fondling or other erotic touching of human genitals, pubic region, buttocks, or female breasts;

(3) less than completely and opaquely covered human genitals, buttocks, or that portion of the female breast below the top of the areola; or

(4) human male genitals in a discernibly turgid state, whether covered or uncovered.

(b) In this section "display" means to locate an item in such a manner that, without obtaining assistance from an employee of the business establishment:

(1) it is available to the general public for handling and inspection; or

(2) the cover or outside packaging on the item is visible to members of the general public.

SEC. 20-134. ENFORCEMENT.

(a) Except as provided by subsection (b), any person violating Section 20-126 of this chapter, upon conviction, is punishable by a fine not to exceed $50.00 per day per violation. It shall be the duty of the director of police services to enforce the provisions of this chapter. Said ordinance may also be enforced by injunctive relief through a court of competent jurisdiction.

(b) If the sexually oriented business involved is a nude studio or sexual encounter center, then violation of Section 20-126 of this chapter is punishable as a misdemeanor.

(c) Except as provided by subsection (b), any person violating a provision of this chapter other than Section 20-126, upon conviction, is punishable by a fine not to exceed $50.00 per day per violation, in accordance with Section 1-8 of this Code.

(d) It is a defense to prosecution under Section 20-122(a), 20-126, or 20-129(d) that a person appearing in a state of nudity did so in a modeling class operated:

(1) by a school licensed by the state of Tennessee; a college, community college, or university supported entirely or party by taxation;

(2) by a private college or university which maintains and operates educational programs in which credits are transferrable to a college, community college, or university supported entirely or partly by taxation; or

(3) in a structure;

(A) which has no sign visible from the exterior of the structure and no other advertising that indicates a nude person is available for viewing; and

(B) where in order to participate in a class a student must enroll at least three days in advance of the class; and

(C) where no more than one nude model is on the premises at any one time.

(e) It is a defense to prosecution under Section 20-122(a) or Section 20-126 that each item of descriptive, printed, film, or video material offered for sale or rental, taken as whole, contains serious literary, artistic, political, or scientific value.

(f) No alcohol permit may be issued for any sexually oriented business premises within the prescribed areas of Section 20-126.

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SEC. 20-135. INJUNCTION.

A person who operates or causes to be operated a sexually oriented business without a valid permit or in violation of Section 20-126 of this chapter is subject to a suit for injunction as well as prosecution or criminal violations.

SECTION 2. BE IT FURTHER ORDAINED, that the provisions of this Ordinance are hereby declared to be severable. If any of these sections, provisions, sentences, clauses, phrases or parts is held unconstitutional or void, the remainder of this Ordinance shall continue in full force and effect.

SECTION 3. BE IT FURTHER ORDAINED, that this Ordinance shall take effect from and after the time it shall have been passed by the Council, signed by the Chairman of the Council, certified and delivered to the Office of the Mayor in writing by the Comptroller, and become effective as otherwise provided by law.

Tom Marshall
Chairman of Council

Attest

Danny N. Wray, Comptroller

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THE FOREGOING ORDINANCE
#4013 PASSED
1st Reading 12-18-90
2nd Reading 1-8-91
3rd Reading 1-15-91
Approved_____
Chairman of Council

Date Signed: s/ Tom Marshall

APPROVED

s/ Richard C. Hackett
Mayor, City of Memphis

Date Signed: 1-29-91

I hereby certify that the foregoing is a true copy, and said document was adopted by the Council of the City of Memphis as above indicated and approved by the Mayor.

s/ David Crum
Comptroller

APPENDIX E — AMENDMENT TO ORDINANCE 4013

ORDINANCE NO.: 4198

ORDINANCE TO AMEND CHAPTER 20,
CODE OF ORDINANCES, CITY OF MEMPHIS,
TO ESTABLISH A NEW FEE,
UNDER CODE SECTION 20-122(c) (1)
AND A NEW IMPLEMENTATION DATE

WHEREAS, the permit provisions of Ordinance 4013 have been held constitutional by the United States District Court for the Western District of Tennessee; and,

WHEREAS, there remains to be determined by said Court only the validity of the fee provided in said Ordinance; and,

WHEREAS, Ordinance 4013 remains subject to a Preliminary Injunction until that issue is resolved; and,

WHEREAS, in order to resolve such outstanding issue without the expense and time involved in a trial, and to provide for proper implementation of the Ordinance, the Council finds it appropriate to address same,

NOW THEREFORE,

SECTION 1. BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF MEMPHIS, that the current City of Memphis Code of Ordinances section 20-122(c)(1) be and hereby is repealed.

SECTION 2. BE IT FURTHER ORDAINED BY THE CITY COUNCIL OF THE CITY OF MEMPHIS, that there be established a new City of Memphis Code of Ordinances section 20-122(c)(1), to read as follows:

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"Section 20-122(c)(1).

The annual fee for a sexually oriented business permit is $500."

SECTION 3. BE IT FURTHER ORDAINED, that Section 3 of the Ordinance be and hereby is repealed.

SECTION 4. BE IT FURTHER ORDAINED, that there be established a new Section 3 of Ordinance 4013, to read as follows:

"Section 3. BE IT FURTHER ORDAINED, that this Ordinance shall take effect from and after the time it shall have been passed by the Council, signed by the Chairman of the Council, certified and delivered to the Office of the Mayor in writing by the Comptroller, and become effective as otherwise provided by law; provided,

That the permit requirements of this Ordinance (sections 20-122, 123, 124, 125, 128, 129, 130, 131, 132, and 133), shall take effect from and after 60 days shall have passed after the December 28, 1990, Preliminary Injunction by the United States District Court for the Western District of Tennessee (Case no. 90-2874), or any extension of it by a competent Court, has been finally dissolved; provided further,

That no sexually oriented business existing at the time this Ordinance becomes effective pursuant to this Section 3, shall be enjoined or in any way prohibited from operation under this Ordinance before or during the pendency of its permit application, said application to be submitted to the director no later than 90 days after final dissolution of the Preliminary Injunction."

Appendix E

SECTION 5. BE IT FURTHER ORDAINED, that the provisions of this Ordinance are hereby declared to be severable. If any of these sections, provisions, sentences, clauses, phrases or parts is held unconstitutional or void, the remainder of this Ordinance shall continue in full force and effect.

SECTION 6. BE IT FURTHER ORDAINED, that this Ordinance shall take effect from and after the date it shall have been passed by the Council, signed by the Chairman of the Council, certified and delivered to the Office of the Mayor in writing by the Comptroller, and become effective as otherwise provided by law.

JACK SAMMONS
Chairman of Council

ATTEST:
Danny M. Wray, Comptroller

THE FOREGOING ORDINANCE
#4198 PASSED
1st Reading 6/15/93
2nd Reading 6/22/93
3rd Reading 6/29/93
Approved s/ Jack Sammons
Chairman of Council
Date Signed: 7-12-93

APPROVED:
s/ W. W. Herenton
Mayor, City of Memphis

Appendix E

Date Signed: 7/29/93
I hereby certify that the foregoing is a true copy, and said document was adopted by the Council of the City of Memphis as above indicated and approved by the Mayor
s/ James Huckabee
Comptroller

(2)

No. 95-203

Supreme Court, U.S.
FILED
AUG 30 1995
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CITY OF MEMPHIS; DR. W.W. HERENTON, Mayor;
MELVIN BURGESS, Director of Police Services,

Petitioners,

vs.

EAST BROOKS BOOKS, INC.,
d/b/a Getwell Bookmart and Airport Adult Theater, STEVE COOPER,
SOUTHERN ENTERTAINMENT MANAGEMENT COMPANY, INC.,
d/b/a Club Tiffany,

Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether "prompt judicial review" of administrative licensing decisions for First Amendment activities, and particularly for licensing decisions pursuant to Memphis' adult business licensing ordinance, is satisfied by providing access to a state court appeal within a specified time (as the First, Fifth, and Seventh Circuit ruled), or must the actual adjudication be completed within a specified time (as ruled by the Fourth and Sixth Circuits).

II. Whether disclosure of certain information by all shareholders in corporate adult businesses violates the First Amendment.

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No. 95-203

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CITY OF MEMPHIS; DR. W.W. HERENTON, Mayor;
MELVIN BURGESS, Director of Police Services,

Petitioners,

VS.

EAST BROOKS BOOKS, INC.,
d/b/a Getwell Bookmart and Airport Adult Theater, STEVE COOPER,
SOUTHERN ENTERTAINMENT MANAGEMENT COMPANY, INC.,
d/b/a Club Tiffany,

Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

The Petition correctly sets forth the opinions below and the jurisdiction.

In addition to the constitutional and statutory provisions cited by the Petitioners, the Respondents[1] attach as Appendix A, the statutory provisions for common law and statutory certiorari. The same procedural framework applies to both writs, but so

[1] There are no parent or subsidiary corporations to be listed.

much of the statutes as prescribed a de novo hearing apply exclusively to the statutory writ of certiorari. Common law writ of certiorari review is limited as discussed hereafter. Also in Appendix A is Rule 10 of the Tennessee Rules of Appellate Procedure by which the writ system was abandoned for interlocutory appeals.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition of the Case Below

The City of Memphis ("the City") originally enacted Ordinance 3988 in October 1990 which imposed a licensing and zoning scheme on all sexually oriented businesses in the City. Plaintiffs filed suit challenging the constitutionality of the licensing and zoning provisions and sought a preliminary injunction which was granted on December 28, 1990. The City passed on January 15, 1991 Ordinance 4013 ("the Ordinance") which superseded the prior Ordinance and contained substantially the same provisions.

Plaintiffs filed in June 1991 a Motion for Partial Summary Judgment relating to the zoning portion of the Ordinance which had required all existing nonconforming uses be terminated at the end of one (1) year. The Court subsequently granted this Motion in August 1992, declaring the amortization provision invalid and in violation of the charter of the City of Memphis and the statutes of the State of Tennessee. This action was subsequently the source of a cross-appeal by the City and affirmed by the Court of Appeals. No further review on zoning is sought by the Petitioners in this cause. In 1992, cross-motions for summary judgment on the licensing provisions of the Ordinance were filed. Two Plaintiffs who were employees of East Brooks Books were dismissed in December 1992 for mootness, in that more than two (2) years had passed since their obscenity convic-

tions which were grounds for disqualification of employment and also grounds for revocation of the employer's license under the Ordinance.

The District Court on May 14, 1993 granted the Summary Judgment Motion of the City, except to the license fee which was later settled.

While the District Court had determined that the Respondents lacked standing to challenge any of the disabling factors for suspension or revocation and lacked standing to challenge prior convictions as a ground for denial of a license, the District Court upheld the disabling factors other than criminal convictions for license issuance. The Sixth Circuit affirmed the lack of standing and vacated that portion of the District Court's opinion which ruled on the disabling factors which had the effect of depriving the District Court's opinion of any precedential effect, so that none of the District Court's findings would be res judicata or collateral estoppel.

The Ordinance requirement that each person with any ownership interest sign the application and meet all license qualifications was found impermissibly broad. Additionally, the Court of Appeals held the denial of a license because the applicant had demonstrated an inability to operate or manage a sexually oriented business premises in a peaceful and law abiding manner, thus necessitating action by a law officer was invalid both as for the license approval and for license suspension. Such challenge was permitted under the overbreadth doctrine by the Court of Appeals.

Finally, the Court of Appeals determined there would be a three (3) to five (5) month wait for administrative hearing and judicial review which did not meet this Court's provision for prompt judicial review. The licensing scheme failed to provide sufficient procedural safeguards and was unconstitutional.

B. Facts

The facts in the record submitted for the determination of the cross-motions for summary judgment are not pertinent. However, the provisions of the Ordinance of the City and the statutory provisions outlining the procedure for common law certiorari are pertinent. The time periods are summarized.

Sections 20-122(b) and 20-124 of the Ordinance are applicable to the administrative hearings, and the statutory procedures are set out in Title 27, Chapter 9 of the Tennessee Code Annotated. (Appendix A).

A new applicant for a license must file with the Director of Police who shall approve the issuance within thirty (30) days after receipt of the application. Applications for a corporation must be filed in the name of all shareholders regardless of ownership and each shareholder must qualify.

If the Director denies issuance of a license, written notice is sent by certified mail or delivered by process server. Appeal of denial must be within ten (10) calendar days after receipt of notice. A hearing must be scheduled on the denial of a license within sixty (60) days. A decision by the Director of Police must be made within five (5) days of the conclusion of the hearing. Any appeal must be made by common law writ of certiorari to a Court of competent jurisdiction. Since a new applicant has no license, no temporary license for operation may be issued during the administrative process or during the pending judicial proceedings.

While the new applicant must appeal within ten (10) days from the decision of the Director of Police, none of this time, nor of any other times applicable for action by the applicant is counted in the computation of the time to apply for, appeal or request judicial review of a license denial.

Upon the filing of the petition for certiorari, the Clerk of the Court shall immediately send by registered return-receipt mail to the board or commission a notice of the filing and a certified copy of the petition. T.C.A. §27-9-107.

The granting of the common law writ of certiorari is discretionary. T.C.A. §27-9-101.

The Board or Commission shall cause to be made, certified and forwarded to the Court a transcript of the proceedings before the Director of Police services. No time limit is provided. T.C.A. §27-9-109.

At the expiration of ninety (90) days from the filing of the transcript, the cause shall stand for trial at the earliest practical date. T.C.A. §27-9-111. While the Court of Appeals indicated a minimum wait from three (3) to five (5) months for judicial review, the time would be even longer since it excluded any period of time to file the transcript which is not specified, or for the applicant for a license to act. Most importantly, the Court of Appeals left out the original thirty (30) day period for the Director of Police to decide a license before any appeal of his decision.

The summary of the time periods would be thirty (30) days for the original review of a license, the time for receipt of written notice of denial by certified mail or delivery by a process server, a potential sixty (60) days delay before a hearing of the appeal before the Director of Police, five (5) days for rendering a decision after conclusion of hearing. Eliminated is any time for the applicant to appeal from the original denial or appeal and file the common law writ of certiorari.

After certiorari, which is discretionary with the Court, is granted the clerk is to notify the City. There is *no time limit* specified for filing the transcript, but the City shall cause the transcript to be made immediately. After the filing of the

transcript, the cause shall stand for trial at the expiration of ninety (90) days although there is no assurance that the hearing will be scheduled immediately at the end of ninety (90) days.

The result is that it is not from three (3) to five (5) months, but in excess of six (6) months before a new applicant for a license would have a judicial review of his application.

While a license holder may request and in the discretion of the Court obtain a stay from revocation or suspension during judicial review, a new applicant who has never had a permit may not obtain a stay during a judicial review. There is no provision in the ordinance to provide for a temporary permit during the application process or appeal, nor is there any possibilities of a stay since a new applicant would not have been in business prior to his application. The statement by Petitioner in footnote one (1) that these matters are not at issue in this Petition is not correct.

The statement of Petitioners that the Ordinance is nearly identical to that litigated in *FW/PBS, Inc. v. City of Dallas* and amendments made in accordance with that decision is a conclusion made in the Preamble of the Ordinance and not as a result of any facts in the record. Certainly, the City did not review its own Charter or the statutory law of Tennessee since the zoning provision was found in violation of the Charter of the City and statutes of the State.

Additionally, the fact that this Court in *FW/PBS* vacated the decision of the Court of Appeals for the Fifth Circuit as to the disabling features of the Dallas Ordinance eliminated any precedential benefit upon which the City could rely for its Ordinance.

REASONS FOR DENYING THE WRIT

1. THE SIXTH CIRCUIT'S OPINION IS IN HARMONY WITH THE DECISIONS OF THIS COURT.

The Sixth Circuit followed the principles first enunciated in *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734 (1965). This Court in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 110 S.Ct. 596 (1990), concluded that the third *Freedman* requirement that the censor should initiate judicial action and bear the burden of proof did not apply to a licensing scheme under review. However, under *Freedman*, *FW/PBS* and other decisions of this Court, the Sixth Circuit determined that the City of Memphis Ordinance was plagued by the same indefinite delays that rendered the ordinance in Dallas unconstitutional in *FW/PBS*. Although this Court has not expressly defined prompt judicial review, the Sixth Circuit believed that potential delays for the issuance of a license of over five (5) months are impermissible. Any administrative decisions must be made "within a specified and reasonably brief time period during which the status quo is maintained." 110 S.Ct. at 606.

Respondents assert that the Sixth Circuit overlooked the original thirty (30) day period for issuance of the license, and that it may be at least ninety (90) days or more of administrative delays before Respondents could petition a court for a common law writ of certiorari and in excess of three (3) months not including the time for filing the transcript before a judicial review. The delays doing administrative hearing for a new applicant for a permit and the delays for judicial review clearly violate the principles established by this Court for procedural safeguards necessary for a license for distribution of materials protected by the First Amendment. Petitioners do not have a sufficiently important request upon which this Court should grant certiorari.

2. THERE IS NO IMPORTANT QUESTION RAISED IN THIS CAUSE REQUIRING REVIEW BY THIS COURT OF ANY ALLEGED CONFLICT BETWEEN THE CIRCUITS.

In applying the principles first established in *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734 (1965), this Court early on decided it need not determine the only constitutional permissible time limits. The Court stated in *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 91 S.Ct. 1400 (1971), that constitutional permissible time limits may vary in different contexts. In *Thirty-Seven Photographs*, the Court determined that it could construe the federal statute to require forfeiture proceedings be instituted within fourteen (14) days and judicial action to be completed within sixty (60) days. A seventy-four (74) day delay for importers from the beginning of the administrative procedure to the final decision in the district court met the procedural safeguards needed.

On the other hand, the Court in *Blount v. Rizzi*, 400 U.S. 410, 91 S.Ct. 423 (1971), could not rewrite the statute which placed the burden of obtaining prompt judicial review on the user rather than the government. In *Teitel Film Corp. v. Cusack*, 390 U.S. 139, 88 S. Ct. 754 (1968), the fifty (50) to fifty-seven (57) day period for obtaining an administrative decision did not amount to a specifically brief period and was impermissible.

In *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 95 S.Ct. 1239 (1975), this Court held that a delay of more than five (5) months before a hearing on the merits was excessive.

Finally, this Court declared in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 110 S.Ct. 596 (1990), that although the Ordinance provided the Chief of Police shall approve the issuance of the license within thirty (30) days after the receipt, the license may not issue until the premises have been approved by the health department, fire department and building official. Since the

Ordinance did not set a time limit in which the inspections must occur, the Ordinance did not meet the procedural safeguard requirements that the decision to issue the license must be issued in a specified and reasonable brief time period during which the status quo is maintained.

The Sixth Circuit correctly considered the rulings of the Court as to administrative and judicial review and correctly determine that a period of three (3) to five (5) months which in reality is in excess of six (6) months from the time that a new applicant applies to the granting of the license did not meet the test established by *Freedman* and *FW/PBS*.

3. THERE IS NO CONFLICT IN THE CIRCUITS REQUIRING REVIEW.

Petitioners' question for review is limited to providing access to a court as opposed to completion of judicial review without any consideration of the time periods in the administrative licensing phrase and presents no conflict in the circuits.

Jews for Jesus, Inc. v. Mass. Bay Transportation Authority, 984 F.2d 1319 (1st Cir. 1993), did not hold that access to a Court met prompt judicial review. The Transit Authority Regulations were not a licensing system which required a prior restraint review. Persons contacted the Authority by telephone, and requested and received permission to engage in noncommercial expressive activity on a first-come-first-served basis. If persons were denied authorization in one location, they may seek to use a different one or to reserve a different time. Upon this basis, the Court found that the authorization requirement is not open to the kind of arbitrary application that the Supreme Court has determined as inherently inconsistent with a valid time, place, and manner regulation, because such discretion has the potential for becoming a means of suppressing a particular point of view. The Court found it was more appropriate to scrutinize the permit system, as the Supreme Court did in *Heffron v. Int'l Society for*

Krishna Consciousness, Inc., 452 U.S. 640, 101 S.Ct. 2559 (1981). This case does not support Petitioners' claim of any conflict between the First Circuit and the decision by the Sixth Circuit in this cause.

Neither does *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir. 1993), support a conflict. *Graff* is an en banc decision construing an Ordinance governing the right of Mr.Graff to obtain a license to build a structure and operate a newsstand on public property. An operator is given fifteen (15) days to remove after the posting of a removal notice and may appeal within that time. A hearing is scheduled within thirty (30) days, and the newsstand operator has fifteen (15) days after the Commissioner's final decision to appeal to the Courts. Five (5) of the twelve (12) judges determined that the Illinois procedure of review of administrative agency decisions by common law writ of certiorari, which review was extremely broad in scope and extends to all questions of fact and law contained in the record before the Court, met the procedural safeguards required of *Freedman*. The time limit for Mr. Graff would be an administrative hearing within thirty (30) days of his appeal. However, any adverse decision was stayed for fifteen (15) days during which time he could appeal to a state court under the Illinois common law writ of certiorari. None of the procedural provisions are set forth in the case. It may be assumed that Mr. Graff could obtain a stay of the removal during the pendency of judicial proceedings. However, the main opinion of five (5) judges noted that it was an open question whether the procedural protection of *Freedman* were necessary in an Ordinance that regulates the building of newsstands on public property. *Graff* is distinguished in *11126 Baltimore Blvd., Inc. v. Prince George's County, Maryland*, 58 F.3d 988 (4th Cir. 1995). In footnote 17 at page 1,000, the Fourth Circuit notes that only five (5) judges join the principal opinion and seven (7) who wrote to concur or dissent all indicated their disagreement that the mere *availability* of judicial review satisfied the prompt judicial review requirement. At least one of the

concurring opinions determined that the Ordinance for occupation of a sidewalk for a newsstand was not the kind of scheme for which the lack of a special provision for prompt judicial review was fatal. Under the circumstances, the Seventh Circuit Opinion in *Graff* is not in conflict.

Not mentioned by the Petitioners is the decision of *Redner v. Dean*, 29 F.3d 1495 (11th Cir. 1994), *cert. denied*, 115 S.Ct. 1697. That Court correctly held that the Ordinance under discussion was inadequate under *any* interpretation of prompt judicial review, because it created the risk that expressive activity could be suppressed indefinitely in the administrative phase *prior* to a judicial review of the decision to deny a license.

The Fifth Circuit in *T.K.'s Video, Inc. v. Denton County, Texas*, 24 F.3d 705 (5th Cir. 1994), considered a licensing Ordinance which required the granting of a denial of the license within sixty (60) days. However, the administrative denial by the Director of Public Works is not final for thirty (30) days. The Denton County Ordinance also provided that an applicant with a license which has been suspended or revoked by the Director of Public Works has the revocation or suspension stayed by the filing of appeal which stay last until final decision by the state district court. The Court of Appeals also determined that the *Denton* Ordinance was invalid in failing to maintain the status quo. An applicant previously operating within the county at the time of the adoption of the Ordinance can continue operation during the licensing. However, an applicant for a license who was not in business when the Ordinance was adopted was not free to operate while its license application was pending. Upon the denial of a license, however, the Court determined that access to the Texas court was sufficient since a rejected license applicant has thirty (30) days to seek judicial relief before the order of the Director of Public Works becomes final. There is no discussion of the relief obtainable in the Texas court. The Court does say that it reads the Supreme Court decision in *FW/PBS* that

the state must offer a fair opportunity to complete the administrative process and access the Courts within a brief period, but a brief period in which all judicial avenues are exhausted would be an oxymoron. The Court goes on to state:

> "FW/PBS requires only a prompt judicial hearing, a standard that the order meets by giving an unsuccessful license applicant thirty days to appeal to a district court in Denton County 'on a trial de novo basis.' The availability of expeditious judicial review obviates the need for an automatic stay. *National Socialist Party v. Village of Skokie*, 432 U.S. 43, 44, 97 S.Ct. 2205 (1977).

24 F.3d at 709.

National Socialist Party held that in the absence of expeditious judicial review, an automatic stay must be granted. It is evident that the Fifth Circuit thought that the access to Court available during this thirty (30) day period before denial of the license was such that it provided the expeditious judicial review because of remedies available in the state court. Subsequently, in *Grand Brittain, Inc. v. City of Amarillo, Texas*, 27 F.3d 1068 (5th Cir. 1994), the Ordinance in *Amarillo* required a licensing decision within eleven (11) days or within three (3) days a reinspection and issuance of license within one (1) day of correction which met the specified and brief requirement for administrative proceedings. Again, the Fifth Circuit denied a mandatory stay should be available and stated the availability of expeditious judicial review and the possibility of a temporary restraining order obviate the need for an automatic stay. *National Socialist Party, supra.* The Court noted that a *denied applicant for a license* can immediately challenge the regulatory decision in Court and request a temporary restraining order to prevent *closing* a business. It notes that in June 1991, which is shortly after the *FW/PBS* decision, the Texas legislature amended the Texas local government code to give district courts jurisdiction for appeals from licensing decisions affecting adult busi-

nesses. Under these circumstances, the judicial procedures in Texas appear to be such that even a *denied applicant* for a license can request a temporary restraining order under the Texas law to prevent closing a business. The minimum administrative periods in both of these ordinances present no conflicts within the circuits requiring this Court to grant the Petitioners' writ of certiorari.

Finally, the Petitioners cite two cases recently decided in the Fourth Circuit of *11126 Baltimore Blvd., Inc. v. Prince George's County Maryland*, 58 F.3d 988 and *Chesapeake B & M, Inc. v. Harford County Maryland*, 58 F.3d 1005 (4th Cir. 1995). In *Harford*, the administrative proceeding for the granting of a license was supposedly forty-four (44) days. However, there was no assurance (similar to *FW/PBS*) that the health department or other agencies required to inspect would report back to the licensing department within thirty (30) days so that the District Court found that the licensing law proceedings indefinite. The District Court held the licensing law was unconstitutional because it did not ensure a reasonably prompt administrative decision and fails to preserve the status quo for existing book stores during the application process. The county did not cross appeal these rulings. The District Court, however, had determined that it was possible that the administrative rulings might be applied constitutionally, and the book store appealed. The Fourth Circuit determined that the licensing decision was unenforceable because it does not ensure a prompt administrative decision and it must vacate the District Court's order to the contrary. *See* 58 F.3d at 1011. However, the Fourth Circuit determined that it would still rule as to whether the county had provided for prompt judicial review and they did so consistent with the Supreme Court licensing cases in which the Court reviewed the adequacy of each procedural safeguard. It concurred with its decision in *11126 Baltimore Blvd., supra*, that prompt judicial review means a sufficiently prompt decision on the merits.

In *11126 Baltimore Blvd., supra*, the special permit provisions of the zoning law were considered to be enough of a licensing scheme as to require a review according to the standards of *Freedman*. The Court of Appeals held that it was unable to conclude that one hundred fifty (150) days was a reasonably brief time frame in which to render an administrative decision on the zoning. The Court found the administrative delay violated procedural safeguards. The Court observed that Justice O'Connor in her plurality opinion did not amend the principles in *Freedman* for a final judicial determination on the merits. Even with a local court rule, the parties did not dispute there would be one hundred three (103) days typically to obtain a judicial ruling after the denial of an application for a general zoning exception. A delay in excess of three (3) months following a one hundred fifty (150) day administrative delay did not ensure a prompt judicial review.

Since this Court recognizes that constitutionally permissible time limits may vary in different contexts, there is no substantial conflict in the circuits, nor does this case present one in which this Court should grant review.

4. ADMINISTRATIVE DELAY INVALIDATES ORDINANCE.

The minimum of ninety (90) days in the Ordinance for application for a license and an appeal is such that this is an unreasonable time period in which to issue a license. The Court need not reach any decision on interpretation of judicial review since it is able to decide the case on another ground of the unreasonable administrative period. While respondents do not agree there is a conflict, the Court should not have to reach the question of the judicial review in that the administrative procedure is so long. Whether or not there is a conflict is irrelevant to the ultimate outcome of the case before the Court because resolving the conflict will not change the result which should be reached because of the unreasonable administrative delay.

Additionally, the review by common law writ of certiorari as discussed herein is discretionary, so that whether or not there is any conflict between access to the court or judicial review on the merits, the point would not be reached because access to the courts in Tennessee are not guaranteed since a common law writ of certiorari is a discretionary remedy.

5. COMMON LAW CERTIORARI IS NEITHER PROMPT NOR MEANINGFUL JUDICIAL REVIEW, NOR GUARANTEED ACCESS TO THE COURTS.

The common law writ of certiorari in Tennessee is discretionary. *Clark v. Metro Government of Nashville*, 827 S.W.2d 312 (1992), discusses common law certiorari as follows:

> The remedy of certiorari is not available as of right, but is granted under unusual or extraordinary circumstances. It is instituted by an application to a court of competent jurisdiction which may or may not authorize the writ.

827 S.W.2d 316-317.

This is not a recent holding in the State of Tennessee. *Uselton v. Price*, 41 Tenn. App. 134, 292 S.W.2d 788 (1953) cites *State, ex rel. Karr v. Taxing Dist. of Shelby Co.*, 84 Tenn. 240 (1886), wherein it is said that certiorari to review proceedings of inferior tribunals is not a writ of right, but is issued in the sound discretion of the Court. *Boyce v. Williams*, 215 Tenn. 707, 389 S.W.2d 272 (1965), was a holding by the Supreme Court that whether common law writ of certiorari will issue is a matter of discretion. *See also, Hewgley v. Trice*, 207 Tenn. 466, 340 S.W.2d 918 (1960). *Boyce* also recognizes the distinction between statutory and common law writ of certiorari in that an administrative act or function is reviewable by the common law writ of certiorari and not by the statutory writ.

The procedures for review by a Court under both common law or statutory writs of certiorari are as set forth in T.C.A. § 29-9-

101, *et seq.*, and a portion is copied in Appendix A. The same procedure for review is used under both kinds of writs. *Fairhaven Corp. v. Tenn. Health Facilities Comm'n*, 566 S.W.2d 885 (1976). However, so much of the statute has prescribed a de novo hearing apply exclusively to the statutory writ of certiorari. *Fentress County Beer Board v. Cravens*, 356 S.W.2d 260 (Tenn. 1962), and *Hoover Motor Express Co. v. R. R. and Public Util. Comm'n*, 195 Tenn. 593, 261 S.W.2d 233 (1953). As discussed in the facts, it would be substantially in excess of ninety (90) days after the filing of a writ of certiorari that the writ would be set for trial if the Court in its discretion granted the writ of certiorari.

The Court review in a common law certiorari is limited to the record to determine as a question of law whether there is any material evidence to support the agency or administrative officer's finding. *Cooper v. Williamson County Board of Educ.*, 746 S.W.2d 176 (Tenn. 1987). While we have spoken of a new applicant for a license, the Memphis Ordinance does not stay a suspension or revocation during a judicial hearing unless the Court would order a writ of supersedeas. Again, this is in the discretion of the Court so that the status quo is not maintained. T.C.A. § 27-9-106. *Hoover Motor Express* is the seminal case in Tennessee on common law writ of certiorari and states:

> Under the common law writ of certiorari, questions of law only will be reviewed by the courts.

261 S.W.2d at 238.

There is not only lack of access to the court since the writ is discretionary, nor a prompt judicial decision, but also the lack of a meaningful full-bodied, genuine and guaranteed judicial review. Review is limited to whether or not in the administrative proceedings, the administrative officer exercising his function exceeded his jurisdiction or acted fraudulently, illegally or arbitrarily.

6. THE PETITION HAS NUMEROUS MISSTATEMENTS OF LAW AND FACT.

The Petition incorrectly states that the administrative ruling is stayed pending a judicial determination. *See* page 4 at Footnote 2. The City incorrectly cites T.C.A. §27-8-112 that supersedeas shall issue to stay any suspension, revocation or denial of a permit. The correct statute on supersedeas on a common law writ of certiorari is T.C.A. § 27-9-106 as cited in Appendix A in which supersedeas is discretionary.

Furthermore, there could not be an automatic stay which would allow a new applicant to have a temporary license. The decision of the Sixth Circuit holds a stay is not possible to permit a new applicant to engage in the business while the license application is on judicial review. The rule is the same in Tennessee. If a new application for a license is denied, a writ of supersedeas does not give a temporary permit. *Watkins v. Naifeh*, 635 S.W.2d 104 (1982). The statement in note 2 that an applicant may obtain a stay during judicial review is in error. The correct fact is that a licensee whose license has been revoked or suspended may (which is discretionary) obtain a stay during judicial review by seeking the writ of supersedeas.

The assertion in footnote 3 on page 8 that the Sixth Circuit recognized that the writ of certiorari is the proper method of review is in error. *Louisville and N.R.R. v. Public Service Comm'n*, 631 F.2d 436 (6th Cir. 1980), recognized that prior to the enactment of the Uniform Administrative Procedures Act in Tennessee in 1974, review by taxpayer of the State Board of Equalization's action was obtained through the common law writ of certiorari. Since this had been changed in 1974, common law writ of certiorari was not the proper method of review at the time of this case. Its hold is that a federal court action against enforcement of tax assessment was not barred by the Anti-Injunction Act.

It is further a misstatement of law to cite the 1902 Tennessee case of *Tennessee Cent. R.R., Co. v. Campbell*, 75 S.W. 1012 (Tenn. 1902), that certiorari is one of the most efficient remedies provided. This quotation applied to certiorari proceeding from a lower court to a higher court and has now been superseded by Rule 10 of the Tennessee Rules of Appellate Procedure which is attached in Appendix A. The comment clearly states that the rule abandons the old terminology associated with the writ system of interlocutory review.

It is also incorrect for the City to assert that as to administrative review, the Sixth Circuit panel left the district court ruling undisturbed (Petition, page 10). This is not so in that the Sixth Circuit considered the time for the administrative hearing, plus the delay for a judicial review to determine that there was no prompt judicial review provided by the Memphis Ordinance. It is further wrong to imply that the City of Memphis has no authority to dictate procedure to a state court. The assertion that the ruling of the Sixth Circuit handcuffs the City and all other municipalities from licensing adult facilities is specious.

Any municipal attorney should advise the Court that a municipal corporation is a creature of law established for special purposes and its acts, must be authorized by its Charter or other laws, which is commonly referred to as "Dillon's Rule." *See McQuillin Municipal Corporation § 10.09, 3d ed. City of Lebanon v. Baird*, 756 S.W.2d 236 (Tenn. 1988), holds that in the almost two hundred (200) years of this state's existence, a substantial and comprehensive body of law controlling the exercise of municipal powers has evolved. Fundamental in this law is that municipalities may exercise only those express or necessarily implied powers delegated to them by the legislature in their Charters or under statutes. There are numerous state statutes which are applicable to municipalities or counties which place certain duties on the courts. For example, there is a special state statute for the control and licensing of beer in Tennessee

which provides for the procedures to be used including judicial review. Additionally, Tennessee adopted a statutory procedure for injunctions against films and magazines following the model of *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 77 S.Ct. 1325 (1957), when it adopted T.C.A. § 39-17-905 in 1965 that a person is entitled to a trial on the issues within two (2) days after the answer and a decision rendered by the court within two (2) days of the conclusion of the trial.

It is certainly a misstatement that permits for parades and other first amendment activities are heard only by writ of certiorari to state court and have less rights than adult entertainment. As early as this Court's decision in *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 89 S.Ct. 935 (1969), the Court recognized for parade permits and other fundamental freedoms not only were objective standards to be applied, but the procedural standards of *Freedman* applicable. Justice Harlan noted in concurring that although Shuttlesworth could have petitioned for a writ of mandamus in the Alabama Circuit Court if the City Commission denied his permit application, that state court was not obligated to render decision within any fixed period of time. The opinion of Justice Stewart noted the assumption that the Ordinance as then construed by the Alabama Supreme Court was constitutional would depend upon, among other things, the availability of expeditious judicial review.

The assertion that law licenses, medical licenses or others are reviewed by the common law of certiorari is not correct. Since 1974 the State of Tennessee adopted the Uniform Administrative Procedures Act by which review of administrative determination is prescribed for all state boards and commissions and any other units of state government. *See* T.C.A. § 4-5-101, *et seq.* Common law certiorari is not the method used.

Finally, the Petition (page 14), asserts a delay of three (3) months inures to the permit holders benefit. This has no application to a new applicant for a license who has nothing to

stay and is kept out of business, not only the three (3) to five (5) months minimum which the Court of Appeals holds, but probably in excess of six (6) months by counting the original thirty (30) days for license application and the time to prepare and file a transcript.

7. REQUIRING ALL SHAREHOLDERS TO PROVIDE DISCLOSURE AND OBTAIN LICENSE FOR CORPORATE ADULT BUSINESS VIOLATES FIRST AMENDMENT.

The Ordinance does not just require minimum disclosure of certain information as the question presented implies. Licenses are to be issued in the names of natural persons only. License applications by corporations require each individual who has an interest in the business to apply. Each person must be qualified for a license. (Ordinance, § 122(a)(5)(7).) The Sixth Circuit followed many other decisions, but cited only two that the requirement that every person with any ownership interest, regardless of how small, sign the license application, is impermissibly broad. Even an argument of accountability is of no significance because officers and directors, not shareholders are legally responsible for the management of a corporation's business. If the corporation does not comply with the licensing privilege, the City of Memphis would be free to take appropriate enforcement action against the corporation, its officers and directors. *See Acorn Investments, Inc. v. City of Seattle*, 887 F.2d 219 (9th Cir. 1989).

There are a series of decisions both appellate and district courts, upholding this principle. The District Court opinion of Judge Gibbons cited no authority and did not distinguish the contrary authorities. *Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir. 1980), correctly determined that providing a disclosure of any shareholder holding more than 10% was not pertinent to enforcement of the ordinance. There could be no purpose other than harassment in requiring individual stockholders to file

separate applications under oath. *T.K.'s Video, Inc. v. Denton Co., Tex.*, 24 F.3d 705 (5th Cir. 1994), affirmed the district court, which eliminated licensing requirements for stockholders, limited partners, and equity holders. District court authorities recognized that an application by shareholders or anyone interested directly in the ownership impinged on First Amendment Rights and information from stockholders was in no way related to the purpose of the ordinances or regulations. *Ellwest Stereo Theater, Inc. v. Boner*, 718 F. Supp. 1553 (M.D. Tenn. 1989); *Penco, Inc. v. Moody*, 474 F. Supp. 1001 (S.D. Ohio 1978); *Natco Theaters, Inc. v. Ratner*, 463 F. Supp. 1124 (S.D.N.Y. 1979). All of these decisions recognize that officers and directors are legally responsible for the management of a corporation's business. Many reason that a compelled content-neutral disclosure of owner information can chill protected expression citing *Talley v. California*, 362 U.S. 60, 80 S. Ct. 536, 4 L. Ed. 2d 559 (1960), and *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958). This Court recently reaffirmed in *McIntyre v. Ohio Elections Comm'n*, ____ U.S. ____, 115 S. Ct. 1511 (1995), that freedom under the First Amendment to publish anonymously extends beyond literary realm to advocacy of political causes. That decision emphasized that disclosure must further a substantial government interest.

Shareholder disclosure was not an issue either in the District Court or Court of Appeals in *Dumus v. City of Dallas*, 648 F.Supp. 1078 (N.D. Tex. 1986), and *FW/PBS Inc. v. City of Dallas*, 837 F.2d 1298 (5th Cir. 1988). The ordinance provisions in Dallas were different from the City of Memphis and only required each individual who had a twenty percent (20%) or greater interest in the business to sign the application for a license. When individual shareholders disclosure was an issue, the Fifth Circuit decided in *T.K.'s Video Inc. v. Denton County, Texas*, 24 F.3d 705 (5th Cir. 1994), that shareholder license requirements were invalid as not related to the purpose of the ordinance.

The City of Memphis should license the corporation rather than harassing stockholders to file separate applications under oath. A truly content-neutral licensing ordinance with narrowly tailored provisions does not need the names of each and every shareholder. The Sixth Circuit in dicta says the city "perhaps" may have an interest identifying those who have a controlling or significant share in such a business. However any future regulation would have to relate to a substantial government interest which we believe would be satisfied by identification of corporate officers.

Although Petitioner asserts that the ruling on shareholder disclosure is inconsistent with the case law of this Court, it cites no decision of this Court to the contrary nor do any of the federal courts of appeal or federal district courts cite any when they invalidate shareholder disclosure. Even the reference by the City of Memphis to Professor Gerard cites no cases of this Court, and states the Supreme Court has never ruled on the constitutionality of licensing scheme that impose personal qualifications on owners or employees of adult businesses.

There is no legitimate governmental interest in requiring stockholders, minority or otherwise, that own, but may or may not actually operate, an adult business to submit information to the Director of Police and be qualified for a license. The Sixth Circuit was correct in finding the provision in the Ordinance requiring each shareholder with any ownership interest to sign the application and meet all license requirements is impermissibly broad. In addition, said requirement serves no legitimate government interest nor is it narrowly tailored to further any legitimate government interest and is not a sufficient ground to warrant the grant of certiorari.

CONCLUSION

The Petition for Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

T.C.A. 27-8-101. Constitutional basis. — The writ of certiorari may be granted whenever authorized by law, and also in all cases where an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction conferred, or is acting illegally, when, in the judgment of the court, there is no other plain, speedy, or adequate remedy. This section does not apply to actions governed by the Tennessee Rules of Appellate Procedure. [Code 1858, § 3123 (deriv. Const. 1834, art. 6, § 10); Shan., §4853; Code 1932, § 8989; T.C.A. (orig. ed.), § 27-801; Acts 1981, ch. 449, § 2.]

T.C.A. 27-8-102. Cases in which writ lies. — Certiorari lies:

(1) On suggestion of diminution;

(2) Where no appeal is given;

(3) As a substitute for appeal;

(4) Instead of audita querela; or

(5) Instead of writ of error.

This section does not apply to actions governed by the Tennessee Rules of Appellate Procedure. [Code 1858, § 3124; Shan., § 4854; Code 1932, § 8990; T.C.A. (orig. ed.), § 27-802; Acts 1981, ch. 449, § 2.]

T.C.A. 27-9-101. Right of review. — Anyone who may be aggrieved by any final order or judgment of any board or commission functioning under the laws of this state may have said order or judgment reviewed by the courts, where not otherwise specifically provided, in the manner provided by this chapter. [Code 1932, § 9008; modified; T.C.A. (orig. ed.), § 27-901.]

T.C.A. 27-9-106. Supersedeas. — (a) If the order or judgment rendered by such board or commission made the basis of

the petition for certiorari shall make any material change in the status of any matter determined therein, the petitioner may, upon reasonable notice to the board or commission and other material defendants, apply to the chancellor, at the time of filing the said petition, for a supersedeas, and the chancellor, in his discretion, may grant a writ of supersedeas to stay the putting into effect of said order or judgment or any part thereof.

(b) No such supersedeas shall be granted until a good and sufficient bond, in an amount to be fixed and approved by the chancellor, shall have been given by the petitioner, conditioned to indemnify the defendants named in the petition from any injury that may result by reason of the granting of said supersedeas. [Code 1932, § 9017; T.C.A. (orig. ed.), § 27-906.]

T.C.A. 27-9-107. Notice of filing to defendants. — Upon the filing of said petition the clerk of the court of pendency shall immediately send, by registered return-receipt mail, to the board or commission a notice of the filing of said petition and a certified copy thereof. The clerk shall also send a similar notice to the last known post office address of each other party named as defendant. [Code 1932, § 9010; T.C.A. (orig. ed.), § 27-907.]

T.C.A. 27-9-109. Transcript of proceedings. — (a) Immediately upon the grant of a writ, the board or commission shall cause to be made, certified and forwarded to said court a complete transcript of the proceedings in said cause, containing also all the proof submitted before the board or commission.

(b) The Clerk of said court shall promptly, by registered return-receipt mail, notify each party named as defendant in said petition of the filing of such transcript. [Code 1932, § 9012; T.C.A. (orig. ed.), § 27-909.]

T.C.A. 27-9-110. Defensive pleadings — Amendments. — (a) All defendants named in said petition, desiring to make defense, shall do so by answer (in which grounds of demurrer

shall be incorporated) to said petition within thirty (30) days from the date of the filing of the transcript, unless the time be extended by the court.

(b) Any other person who may be affected by the decision to be made by said court may, upon leave given, intervene and file such an answer in the cause.

(c) Amendments may be granted as in chancery procedure. [Code 1932, § 9013; T.C.A. (orig. ed.), § 27-910.]

T.C.A. 27-9-111. Hearing - Findings. — (a) At the expiration of ninety (90) days from the filing of the transcript, the cause shall stand for trial, and shall be heard and determined at the earliest practical date, as one having precedence over other litigation, except suits involving state, county or municipal revenue.

(b) The hearing shall be on the proof introduced before the board or commission contained in the transcript, and upon such other evidence as either party may desire to introduce.

(c) The party shall reduce all findings of fact and conclusions of law to writing and make them parts of the record.

(d) In making such findings of fact, the judge shall weigh the evidence and determine the facts by the preponderance of the proof. [Code 1932, § 9014; Acts 1951, ch. 261, § 1; T.C.A. (orig. ed.), § 27-911; Acts 1987, ch. 28, §§ 1-3.]

RULE 10. EXTRAORDINARY APPEAL BY PERMISSION ON ORIGINAL APPLICATION IN THE APPELLATE COURT

(a) Original Application for Extraordinary Appeal; Grounds. An extraordinary appeal may be sought on application and in the discretion of the appellate court alone of interlocutory orders of a lower court from which an appeal lies to the Supreme Court, Court of Appeals or Court of Criminal Appeals:

(1) if the lower court has so far departed from the accepted and usual course of judicial proceedings as to require immediate review, or (2) if necessary for complete determination of the action on appeal as otherwise provided in these rules. The appellate court may issue whatever order is necessary to implement review under this rule.

. . .

Advisory Commission Comment

. . .

This rule abandons old terminology associated with the writ system of interlocutory review in order to avoid irrelevant historical considerations associated with the writs. Subdivision (a) expressly empowers the appellate court to issue whatever order is necessary to implement review, and rule 36 permits the court to grant whatever relief is appropriate.

This rule, like rule 9, is available to both the defendant and the state in criminal actions.

(3)

Supreme Court, U.S.
FILED
SEP 25 1995
CLERK

No. 95-203

In The

Supreme Court of the United States

October Term, 1995

CITY OF MEMPHIS; DR. W.W. HERENTON, Mayor; MELVIN BURGESS, Director of Police Services,

Petitioners,

vs.

EAST BROOKS BOOKS, INC., d/b/a Getwell Bookmart and Airport Adult Theater, STEVE COOPER, SOUTHERN ENTERTAINMENT MANAGEMENT COMPANY, INC., d/b/a Club Tiffany,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF

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7 pp

Respondents' Brief in Opposition to Certiorari contains numerous irrelevancies and errors of law, which we correct below.

1. Respondents' recitation of the judicial review times involved in the various cases is unresponsive and is a false distinction. Resp. Br. 8-14. The issue here is the sufficiency of referring a disappointed permit applicant or holder to the state courts and state court procedures for adjudication, or the wholesale intrastate political and judicial restructurings that the Sixth Circuit opinion effectively requires for local regulation of First Amendment activities.

2. Respondents' arguments regarding denial of a new applicant are irrelevant. Resp. Br. 6, 17, 19. The Sixth Circuit affirmed that no interim permit is required for rejected applicants. *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 225 (6th Cir. 1995), Pet. App. B, page 10a. Respondents have not sought certiorari from that ruling. In any event Respondents, who own existing adult businesses, lack standing to raise the issue.

3. Respondents cite the incorrect statutes for common-law certiorari. Resp. Br. 1, 5, 6, 15, 16, 17. Your Petitioners will again correct Respondents in that Tennessee Code Annotated § 27-8-101, *et seq.*, "Certiorari and Supersedeas," applies when obtaining certiorari from the decision of an "officer." Tenn. Code Anno. § 27-8-101. The cited Chapter 9, T.C.A. §§ 27-9-101, *et seq.*, is entitled "Review of Boards and Commissions," and applies to appeals from such bodies.

The Memphis permit decision is made by an *officer, i.e.*, the Director of Police Services. Ord. § 20-122(b)(1), Pet. App. D, 66a. Under the correct Chapter 8, "[t]he writ of certiorari may be granted *whenever authorized by law, and* also *in all cases* where an inferior tribunal, board, or officer exercising judicial functions

has exceeded the jurisdiction conferred, or is acting illegally,. . ." when, in the judgment of the court, there is no other plain, speedy, or adequate remedy. Tenn. Code Anno. § 27-8-101 (emphasis added). Here, the writ is both specifically authorized by the Ordinance and would be generally available even if it were not. Ord. § 20-124(6), Pet. App. D, 74a. *Accord Graff v. City of Chicago,* 9 F.3d 1309, 1325 (7th Cir. 1993), cited at Pet. p. 8 (referring denied permit-holder to general state court procedure satisfies prompt judicial review requirement). Further, the correct chapter provides that supersedeas, or stay, "*shall*" issue in all necessary cases, and "*shall* effectively supersede all further proceedings . . . ." Tenn. Code Anno. § 27-8-112 (emphasis added), App. F hereto. The rule is ancient that supersedeas "ought *always* to be used on a proper case shown, to prevent mischief." *Kearney v. Jackson,* 9 Tenn. 294 (1830) (emphasis added).

4. Respondents belie their own argument on the supposed insufficiency of the Tennessee common-law writ of certiorari by describing the apparently identical Illinois writ as "extremely broad in scope and [extending] to all questions of fact and law contained in the record before the Court." Resp. Br. 10. Review by Tennessee common-law writ of certiorari "requires a searching and careful inquiry and subjects the agency's decision to close scrutiny." *Nat'l Council on Compens. Ins. v. Gaddis,* 786 S.W. 2d 240, 242 (Tenn. App. 1988), *perm. app. denied,* (1990). The reviewing court examines not only the legality of the administrative proceeding, but, as the District Court noted, "the conclusions of law, or mixed fact and law, reached by the administrative body below." *See* District Court Order, Pet. App. C 32a, *citing Pack v. Royal-Globe Ins. Co.,* 457 S.W.2d 19, 22 (Tenn. 1970), *Boyce v. Williams,* 215 S.W. 2d 272 (Tenn. 1965). The District Court noted that "'[a]cting illegally' . . . encompasses findings of fact for which there is no legally sufficient basis and therefore, under the writ, the reviewing court

must review the facts considered and record established by the administrative body." *Id.*, Pet. App. C, 32a. (The Sixth Circuit did not address Respondents' arguments on the sufficiency of the writ *per se*.)

5. There is no distinction between the Tennessee common-law writs of certiorari described at Tenn. Code Anno. §§ 27-8-101, *et seq.*, and certiorari as provided in the Tennessee Uniform Administrative Procedures Act, Tenn. Code Anno. § 4-5-322, *see especially,* 322(f) and (h), except for any minor procedural differences called for in the Admin. Proc. Act § 4-5-322(f). *Cf.* Resp. Br. 17, 19. Both the Tennessee Digest ("Certiorari") and the literature treat such writs together and make no distinction. *See, e.g.,* 2 *Tennessee Jurisprudence,* Appeal & Error § 8 "Certiorari." Also, the writ described in *Tennessee Central R. Co. v. Campbell,* 75 S.W. 1012 (Tenn. 1912) as "one of the most valuable and efficient" remedies provided, although no longer used for interlocutory appeals, is the identical common-law writ now called for in the Ordinance. *See Hewgley v. Trice,* 207 Tenn. 466, 340 S.W. 2d 918, 921 (1960), *reh. denied; McGee v. State,* 207 Tenn. 431, 340 S.W. 2d 904 (1960); *Roberts v. Brown,* 43 Tenn. App. 567, 310 S.W. 2d 197 (1957); *cf.* Resp. Br. 2, 18.

6. "Although a municipal corporation has no inherent licensing power, that power is delegated to municipal corporations by the state." McQuillen, *Municipal Corporations* § 26.22.05. *Cf.* Resp. Br. 18. Additionally, Memphis is a home-rule city, and such authority is derived through its charter. The preamble to this Ordinance notes the City Charter authority to enact appropriate police and other legislation ensuring the public health, safety, and welfare. Pet. App. D, 52a. (Respondents did not raise this issue until their response to petition to rehear, at the Sixth Circuit.)

7. Respondents continue to rely upon obscenity cases and statutes. Resp. Br. 19. Such cases are irrelevant for the reasons given at Petition pp. 12-13.

8. *Redner v. Dean.* Contrary to Respondents' assertion, Resp. Br. 11, your Petitioners cite and quote *Redner v. Dean*, 29 F.3d 1495 (11th Cir. 1994), at Petition pp. 9, 10, and 11.

9. The availability of expeditious judicial review obviates the need for a stay, as Respondents correctly state. Resp. Br. 12. *National Socialist Party v. Village of Skokie*, 432 U.S. 43, 44, 97 S. Ct. 2205 (1977). One is an alternative to the other. *Id.* The Memphis Ordinance provides for both. Ord. §§ 20-124(6), (7), Pet. App. D, 74a-75a.

10. Both Professor Gerard's quote and Petitioners cite case law supporting the argument that the Sixth Circuit opinion effectively grants greater rights to adult business owners than others enjoying supposedly greater First Amendment protection. Pet. 16-17; *cf.* Resp. Br. 22. The case cited upholds a federal statute requiring corporately-owned newspapers and periodicals using the mails annually to furnish *and to publish* "the identity of the corporation and stockholders thereof," and other information such as identification of mortgagees — the only federal statute known to Petitioners that mandates the content of publication, and this for *fully-protected* speech. *Lewis Publication Co. v. Morgan*, 229 U.S. 288 (1913), upholding 39 U.S.C. § 3865. Yet the Sixth Circuit opinion holds unconstitutional the mere *furnishing* of names of stockholders in corporations that engage in only marginally-protected speech, where the purpose of such disclosure is to check the secondary criminal and other activity that this Court has recognized such businesses engender.

11. The preliminary injunction in this case was by consent. *See* Resp. Br. 2.

12. Petitioners refer the Court to our Petition in all further reply to the Brief in Opposition.

CONCLUSION

For these reasons, and those provided in the Petition, the Court should grant a writ of certiorari.

Respectfully submitted,

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APPENDIX F — RELEVANT STATUTES

Title 27, Chapter 8, "Certiorari and Supersedeas"

Tenn. Code Anno. § 27-8-101. Constitutional basis. The writ of certiorari may be granted whenever authorized by law, and also in all cases where an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction conferred, or is acting illegally, when, in the judgment of the court, there is no other plain, speedy, or adequate remedy.

Tenn. Code Anno. § 27-8-112. Supersedeas. The clerk shall also issue a writ of supersedeas in all necessary cases, directed to the opposite party, or the officer in whose hands the execution may be, which shall effectually supersede all further proceedings thereon.